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The Constitutional Requirement of Some Evidence

Gerald L. Neuman

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The Constitutional Requirement of “Some Evidence”

GERALD L. NEUMAN*

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The Constitutional Requirement of "Some Evidence"

GERALD L. NEUMAN*

I. INTRODUCTION

"[A] governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence."¹ This statement, sometimes known as the "some evidence" requirement,² may command immediate assent, but then it provokes a further reaction: what on earth does it *mean*?³ The federal courts have articulated this rule for over seventy years. The Supreme Court has relied on it in overturning numerous state and federal decisions. But the Court has never given more than the most

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1. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985).

2. It is variously phrased, most frequently in terms of "some evidence," *e.g.*, *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 106 (1927), or "any evidence," *e.g.*, *Superintendent v. Hill*, 472 U.S. at 455, or, conversely, in terms of "no evidence," *e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969). These are all the same requirement. I will try to use the phrase "some evidence" throughout, and would prefer that it become standard; as will appear later, I hope to prove that the "no evidence" phrasing is particularly misleading.

3. See *Freeman v. Zahradnick*, 429 U.S. 1111, 1114 (1977) (Stewart, J., dissenting from denial of certiorari) ("[C]an any definable content be discerned in the 'no evidence' rule?"); Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 66 (1968) ("surely, every case has some testimony to some effect").

cursory attention to its basis, function, or content.

Where does the rule apply, and how does it apply? The above quotation is from a recent opinion by Justice O'Connor, confirming the rule's extension to revocation of good time credits by a state prison disciplinary board. One might welcome the extension as a signal that the "some evidence" requirement has not fallen victim to the late Burger Court's counterreaction to the due process explosion. Or one might be chilled by the stress on "loss of an important liberty interest" — can government take away property or "unimportant" liberty interests without any evidence to support its action?

On the other hand, Justice O'Connor's demand that state prison officials point to "some evidence" might raise eyebrows among students of the Burger Court's jurisprudence of federalism. What business does a federal court have inquiring into the evidentiary support for a state administrative ruling? Federal courts are accustomed to reviewing the orders of many federal administrative agencies for substantial evidence under the Administrative Procedure Act (APA);⁴ that standard requires evidence sufficient to permit a reasonable factfinder to reach the challenged factual conclusion.⁵ But the responsibilities of federal courts in federal administrative law do not generally carry over to supervision of state administrative agencies.

The Supreme Court has repeatedly insisted that the "some evidence" requirement is *not* a test of the sufficiency of the evidence.⁶ Yet how can we articulate a standard weaker than the substantial evidence test? What purpose could such a minimal standard serve? Of course, these questions are linked with the question of the Court's authority to impose this requirement on the states. The function of the requirement should be crucial to both its content and its legitimacy.

In this article, I propose to give the "some evidence" requirement more serious and sustained attention than it has generally received. I will examine how it has worked in the past, what functions it appears to serve, and how it should work in the future.

I will discuss and defend the "some evidence" requirement within a due process model of factfinding in adjudication. I will limit the discussion to contexts that have certain features in common. First, they are adjudications, whether by courts or by nonjudicial tribunals, to which the requirements of procedural due process apply. Under

4. Pub. L. No. 89-554, 80 Stat. 378, 5 U.S.C. § 551, 706 (2)(E) (1982) [hereinafter *APA*].

5. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The substantial evidence test is discussed in greater detail and contrasted with the "some evidence" test in section 1 of the Appendix, see *infra* p. 730.

6. See *infra* text accompanying notes 185-87.

current constitutional dogma, that means that the underlying dispute involves a determinable "entitlement" to life, liberty or property.⁷ Second, I will assume from the outset that we are operating within a context where due process requires not only that the claim of entitlement be resolved through "some kind of a hearing," but specifically that certain factual disputes determining the claim be resolved impartially on the basis of a delimited body of evidence produced before the decisionmaker or identified by her, known in a broad sense as the "record." Third, I will assume that either the notice to the individual of the issues for decision or a statement of reasons given after the decision is informative enough to permit recognition of the factual findings on which the decision was based.⁸ In such a context, it is meaningful to ask how well the evidence in the "record" supports the factual findings.

In focusing on the factfinding aspect of adjudicative decisions, I do not mean to favor one element of the law/fact duality or to suggest that factfinding is unequivocally separable from law-determining in adjudication.⁹ But, as I will later emphasize,¹⁰ adjudicative factfinding about an individual, in a proceeding to determine her rights, triggers especially strong claims to rights of participation. Ultimately, a procedural due process "some evidence" requirement is founded on the need to vindicate those rights, in the face of pressures that may tempt the decisionmaker to sacrifice individual justice to other preferences or policies. I will claim that the notion of "some evidence" should be understood in terms of due process norms respecting the integrity of adjudicative procedure, principally norms of impartiality and conscientious attention to an individual's contributions. These

7. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

8. This might or might not be required by due process. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 267-70 (1970) (statement of reasons required in termination of welfare benefits); *Ponte v. Real*, 471 U.S. 491 (1985) (no statement of reasons required when prison disciplinary board denies prisoner right to call witnesses); *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1 (1979) (parole board not required to summarize evidence indicating prisoner's unsuitability for parole).

9. Indeed, my own interest in this subject dates from the statement by one of my teachers that the Supreme Court's holdings in *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (a state criminal conviction without some evidence to support it violates due process), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (a state criminal conviction based on an unforeseeable interpretation of a state statute violates due process), could not properly coexist because, though either was justifiable by itself, to maintain both was an unnecessary and improper interference with the states. At the time, I regarded the two as properly complementary (I still do). An avid deconstructor of the law/fact distinction might even conclude that the two are identical.

10. *See infra* text accompanying notes 268-76.

norms are so fundamental and of such widespread application that the "some evidence" requirement should also be given a very wide scope. If accepted, this observation has significant consequences regarding opportunities for judicial review of administrative and quasi-administrative decisions.

Since the "some evidence" rule is not on the tip of everyone's tongue, I will try to put it in context by describing its history at some length in Part II. (A fuller comparison of "some evidence" with other doctrines concerning evidentiary support may be found in the Appendix at the end of this article.) The stories told in Part II serve as the basis for an inquiry into the nature and purpose of the "some evidence" requirement in Part III. Part III is exploratory in method, and attempts to work backward from these examples toward a better understanding and a more precise formulation of the notion of "some evidence" review. I will then attempt in Part IV to work forward from stated assumptions regarding due process methodology, to provide an affirmative justification for judicial imposition of "some evidence" review, both in traditional due process terms (Part IV(A)) and in terms of the currently fashionable cost-benefit balancing (Part IV(B)). Finally, in Part V, I will briefly discuss some of the implications of my account for a variety of adjudicative systems.

II. SOME LANDMARKS IN THE HISTORY OF THE "SOME EVIDENCE" REQUIREMENT

In this Part, I will sketch the history of the "some evidence" requirement in the Supreme Court, from its initial appearance as a due process requirement for federal administrative action in the early twentieth century, through repeated reassertions and extensions to new adjudicative contexts. By setting out the context of these cases in some detail, I hope to shed light on the function of the "some evidence" requirement, and on the forces that have led the Court to reaffirm repeatedly its broad applicability.

One could sum up the contents of this Part formalistically in brief compass: In 1912, the Supreme Court articulated the "some evidence" test as a due process requirement applicable on habeas corpus review of decisions by immigration officials to exclude aliens; in 1913 the Court extended it to review of Interstate Commerce Commission (ICC) orders regulating railroad operations; in 1946 the Court extended it as an exception to the finality of selective service classification decisions; in 1960 the Court extended it to direct review of state court criminal convictions; and in 1985 the Court approved its application to state prison disciplinary proceedings. But this bare, almost random, recitation tells us little about the scope of applicability of the requirement, its rationale, or what "some evi-

dence" means. If we wish to understand the content of the "some evidence" requirement, let alone its justification, we need a fuller account of the background of these extensions.

A. The Immigration Cases: Tang Tun and its Progeny

The immigration cases give the clearest indication of a rationale for a constitutional "some evidence" test. Ironically, this development of due process limits on administrative adjudication may be traced to the Supreme Court's extraordinary deference to immigration legislation. The Court has long treated congressional regulation of aliens as an exercise of sovereignty largely unfettered by judicially enforceable constitutional limitations. The exceptional character of immigration law reflects its affinity to the conduct of foreign policy, a perception that government owes lesser responsibilities to noncitizens, and doubts about the extraterritorial force of the Constitution.¹¹ This deference has permitted race prejudice to exercise an influence at the policy level, although the Court has been unwilling to tolerate such influence when it surfaces at the implementation level.¹²

The first federal legislation against "undesirable" immigrants was enacted in 1875, followed by the wholesale exclusion of Chinese laborers in 1882.¹³ Congress authorized executive officials stationed at seaports and land borders to deny ineligible aliens admission to the United States after proceedings of a summary character.¹⁴ When aliens challenged these proceedings as denying them due process of law, the Supreme Court insisted that supervision of immigration was an executive, not a judicial function. In a manner typical of the period, the Court was more alert to questions addressing the placement

11. See Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1-3, 14-17 (1984); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (Holmes, J.).

12. Compare, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) and *Chang Chan v. Nagle*, 268 U.S. 346 (1925) with *Jean v. Nelson*, 472 U.S. 846 (1985) and *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) ("It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race.").

13. The "undesirables" included both prostitutes and convicts. Act of Mar. 3, 1875, ch. 141, § 3, 5, 18 Stat. 477.

14. See *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). Responsibility for administration of the immigration laws shifted from the Treasury Department (which also handled customs) to the Department of Commerce and Labor before coming to rest in the Department of Justice.

of the power in the appropriate branch, than to procedural questions addressing the manner of its exercise.¹⁵

In the earliest cases, some federal judges were willing to review exclusion decisions under a "no evidence" standard borrowed from the law of extradition.¹⁶ In 1888, the Supreme Court held that the original Chinese Exclusion Act permitted some judicial review of exclusion decisions.¹⁷ Shortly thereafter, however, Congress began enacting provisions conferring finality on the decisions of immigration officials.¹⁸ The Supreme Court upheld these finality provisions, finding that they made the executive "the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted."¹⁹

The immigration officials made distressing use of the discretion they had been granted. The administration of the Chinese exclusion laws sparked particular controversy. With some encouragement from both Congress and the Court,²⁰ executive officials regarded the testimony of Chinese witnesses as inherently suspect, especially when offered in support of claims to nonlaborer status²¹ or United States citizenship.²² The officials saw themselves as confronting a mass of fraudulent claims backed by perjured witnesses suborned by unscrupulous attorneys in the pay of a Chinese conspiracy.²³ The bureaucracy believed itself powerless to catch all the frauds, but openly an-

15. See *Wong Wing v. United States*, 163 U.S. 228 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *United States v. Ju Toy*, 198 U.S. 253 (1905); cf. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

16. See *In re Cummings*, 32 F. 75 (C.C.S.D.N.Y. 1887); *In re Day*, 27 F. 678, 680 (C.C.S.D.N.Y. 1886) (citing *In re Stupp*, 23 F. Cas. 296, 300 (C.C.S.D.N.Y. 1875) (No. 13,563)). The extradition standard and its relation to the "some evidence" test are discussed in section 5 of the Appendix, see *infra* p. 735.

17. *United States v. Jung Ah Lung*, 124 U.S. 621 (1888). In that case, the Court affirmed the grant of habeas corpus based on the executive's error of law in construing the 1882 statute.

18. E.g., Act of Sept. 13, 1888, ch. 1015, § 12, 25 Stat. 477-79, *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600. (finality of decisions excluding Chinese); Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084 (finality of other exclusion decisions).

19. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

20. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 729-32 (1893) (upholding statutory requirement of evidence from "at least one credible white witness" in support of belated request for residence certificate).

21. Only Chinese "laborers" were excluded in this period; though the term was broadly defined, it did not apply to diplomats, students, well-to-do travelers, or to Chinese merchants, whose participation in trans-Pacific trade the United States sought to encourage. See, e.g., *United States v. Mrs. Gue Lim*, 176 U.S. 459 (1900); see generally D. McKee, CHINESE EXCLUSION VERSUS THE OPEN DOOR POLICY 1900-1906 (1972).

22. The Supreme Court had rejected the executive's view that children born in the United States to Chinese parents were not American citizens. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

23. See, e.g., FACTS CONCERNING THE ENFORCEMENT OF THE CHINESE EXCLUSION LAWS, H.R. Exec. Doc. No. 847, 57th Cong., 1st Sess. 7-21 (1906) [hereinafter FACTS CONCERNING ENFORCEMENT].

nounced a strategy of detecting deceit by isolating arriving Chinese in holding centers and then trapping them in minor testimonial inconsistencies.²⁴ Protests against the degrading conduct of the immigration officials were common in this period;²⁵ one American scholar condemned their "corruption[,] oppression, prejudice and intolerance,"²⁶ and in 1905 a boycott of American goods was organized in China in response to the mistreatment of merchants and students, who were legally entitled to enter the United States.²⁷

In 1903, in a case not involving Chinese exclusion, the Supreme Court went out of its way to emphasize that immigration officials were not free from all due process constraints.²⁸ And in 1908, in *Chin Yow v. United States*,²⁹ the Supreme Court permitted an excluded passenger from China to prove that immigration officials had arbitrarily denied him the opportunity to present evidence in support of his claim of American birth. The Court recognized that the statute made the executive decision final, but only "on the presupposition that the decision was after a hearing in good faith, however summary in form."³⁰ Significantly, the Court held that if Chin Yow could show misconduct by immigration officials, the district court should determine his citizenship claim itself, rather than giving the executive an opportunity to reconsider.³¹ The implications of *Chin Yow* were not immediately clear to the lower courts. Learned Hand believed that it guaranteed only the formalities of a hearing,³² while the Second Circuit concluded that it authorized a court to overturn an exclusion decision based on such wholly inconsequential discrepancies as to demonstrate that the decision "was the result of prejudice instead of judicial fairness."³³

24. See *Id.* at 9-11, 27, 67-68, 99; M. COOLIDGE, CHINESE IMMIGRATION 299-301 (1909); S. TSAI, CHINESE EXPERIENCE IN AMERICA 99-101 (1986); W. VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS 61-62 (1932).

25. See generally FACTS CONCERNING ENFORCEMENT, *supra* note 23, at 125-46; M. COOLIDGE, *supra* note 24, at 278-334, 459-85.

26. M. COOLIDGE, *supra* note 24, at 331.

27. *Id.* at 469-81; FACTS CONCERNING ENFORCEMENT, *supra* note 23, at 147-57; S. TSAI, *supra* note 24, at 77-79; see generally D. MCKEE, *supra* note 21.

28. *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 99-101 (1903) ("But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.").

29. 208 U.S. 8 (1908).

30. *Id.* at 12.

31. *Id.* at 12-13.

32. *United States ex rel. Glavas v. Williams*, 190 F. 686 (C.C.S.D.N.Y. 1911).

33. *United States v. Chin Len*, 187 F. 544 (2d Cir. 1911).

A district judge in Washington also interpreted *Chin Yow* as empowering him to set aside decisions so contrary to the evidence as to demonstrate prejudice. He concluded that immigration officials had wrongfully rejected the citizenship claims of one Tang Tun, relying on incompetent documentary evidence and speculation as against the testimony of credible witnesses and supporting documents.³⁴ The court of appeals reversed, finding that Tang Tun had received a fair hearing involving "a very considerable quantity of evidence introduced by each side," so that the district court was precluded from reviewing the admission or the weight of the evidence.³⁵ The Supreme Court granted certiorari, and agreed with the court of appeals.³⁶

The Court held first that the immigration officials had not erred in admitting the challenged documents.³⁷ The Court then considered Tang Tun's claim "that the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration of their case to which they were entitled."³⁸ The Court examined the facts and concluded that this claim was unsupported: two witnesses had been successfully impeached, Tang Tun had testified on his own behalf, and one disinterested witness had claimed that he could recognize the adult Tang Tun, even though he had last seen him when Tang Tun was five years old. The Court found that this was evidence for consideration by the immigration officials, and that the record did not show "that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law."³⁹

The Supreme Court repeated in a series of further decisions the rule that finality provisions must yield when the lack of evidentiary support for an immigration official's finding was "so flagrant as to convince a court that the hearing had was not a fair one."⁴⁰ While the concerns that led the Court to adopt this rule may have arisen in cases involving claims of citizenship,⁴¹ the Court treated it as equally applicable to other factual disputes under the immigration laws.⁴²

34. *In re Tang Tun*, 161 F. 618 (W.D. Wash. 1908), *rev'd*, 168 F. 488 (9th Cir. 1909), *aff'd* 223 U.S. 673 (1912).

35. *In re Tang Tun*, 168 F. 488, 496 (9th Cir. 1909), *aff'd* 223 U.S. 673 (1912).

36. *Tang Tun v. Edsell*, 223 U.S. 673 (1912).

37. *Id.* at 679-81.

38. *Id.* at 681.

39. *Id.* at 681-82.

40. *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924).

41. *See Tang Tun*, 223 U.S. at 673, *Chin Yow*, 208 U.S. at 8; *see also* *Kwock Jan Fat v. White*, 253 U.S. 454 (1920) (finding due process denial in immigration inspector's suppression of testimony favorable to claimant's citizenship).

42. *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 106 (1927) (advocating overthrow of government); *United States ex rel. Tisi v. Tod*, 264 U.S. 131,

Once the Court was driven to hold that the Due Process Clause itself required judicial determination of nonfrivolous citizenship claims, it eliminated the need for such review of citizenship disputes in deportation proceedings.⁴³ This holding did not apply, however, to proceedings for exclusion of arriving passengers,⁴⁴ and lower courts continued to overturn exclusion decisions that relied on trivial discrepancies to discredit the claimant's testimony.⁴⁵

Over time, the statement of the test was worn down to the inquiry whether there was "any evidence" or "some evidence," as opposed to "no evidence," to support the administrative finding.⁴⁶ The Court even applied this standard to review of fines levied by immigration officials on steamship companies that brought inadmissible aliens to port.⁴⁷ But its foundation as a guarantee of a fairminded hearing was not forgotten. Rather, it was emphasized when the Court overturned the condemnation of Harry Bridges as a Communist Party member,⁴⁸ after "a concentrated and relentless crusade to deport [him] because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution."⁴⁹

133 (1924) (knowing distribution of seditious publication); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (proof of alienage in absence of claim of citizenship); *Zakonaite v. Wolf*, 226 U.S. 272, 274-75 (1912) (prostitution).

43. *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922) (emphasizing the "difference in security of judicial over administrative action"); cf. *United States v. Woo Jan*, 245 U.S. 552, 556 (1918) (administrative proceeding lacks "safeguards of impartiality and providence" that judicial proceeding offers).

44. *Ng Fung Ho*, 259 U.S. at 282 (declining to overrule *United States v. Ju Toy*, 198 U.S. 253 (1905)).

45. See, e.g., *Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast*, 24 F.2d 632 (1st Cir. 1928); *Go Lun v. Nagle*, 22 F.2d 246 (9th Cir. 1927); *Johnson v. Damon ex rel. Leung Fook Yung*, 16 F.2d 65 (1st Cir. 1926).

46. *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 102, 106 (1927); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1924); *Ng Fung Ho v. White*, 259 U.S. 276, 278 (1922). The Court emphasized in *Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) that this review was narrower than review for substantial evidence under the APA, and indeed that this review was the minimum constitutionally permissible scope of review in deportation cases. Only after the passage of the Immigration and Nationality Act of 1952 was substantial evidence review made available in exclusion and deportation cases. See *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (applying judicial review provisions of APA to orders under the 1952 Act); *Woodby v. INS*, 385 U.S. 276 (1966).

47. *Lloyd Sabauda SpA v. Elting*, 287 U.S. 329, 335 (1932).

48. *Bridges v. Wixon*, 326 U.S. 135, 149, 156 (1945). Although the Court discussed the "some evidence" requirement, ultimately it overturned the finding because of reliance on nonprobative hearsay admitted in violation of agency rules, making it unnecessary to decide whether "some evidence" supported the finding.

49. 326 U.S. at 157 (Murphy, J., concurring). See generally A. KONVITZ, CIVIL

B. *The ICC Cases and the Spread of the Substantial Evidence Test*

When an arbitrary date is needed to mark the commencement of the modern period in American administrative law, most writers fall back on 1887.⁵⁰ In that year, Congress created the first federal independent regulatory commission, the ICC, and federal public administration began to penetrate private business activity in a manner that prompted the Supreme Court to rethink the extraordinarily deferential administrative law of the nineteenth century.⁵¹ The Court was innovative in protecting the railroads from hostile regulation,⁵² and it would have been surprising if the benefit of a constitutional "some evidence" requirement, once it emerged, had been denied to them.

As it turned out, reference to a constitutionally mandated standard of review in ICC cases was largely rhetorical, because Congress did not attempt to limit judicial review to the same degree as in the immigration statutes. The original Interstate Commerce Act made judicial proceedings a prerequisite for enforcement of ICC orders; factual findings of the ICC were only *prima facie* evidence in such proceedings.⁵³ In the Hepburn Act of 1906, Congress expanded the Commission's power and made many of its orders enforceable without resort to the courts.⁵⁴ At that time, Congress considered expressly conferring finality on the ICC's findings, but this move was opposed, and in the end Congress left the Hepburn Act ambiguous.⁵⁵

When the Court confronted the scope of review under the new statute, it rejected the government's argument that Congress had eliminated judicial review altogether. Three major cases articulate

RIGHTS IN IMMIGRATION 114-22 (1953); Note, *In re Harry Bridges*, 52 YALE L.J. 108 (1942); C. LARROWE, *HARRY BRIDGES: THE RISE AND FALL OF RADICAL LABOR IN THE UNITED STATES* (1972).

50. See, e.g., Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 9 (1965); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 384 (1973).

51. Rabin, *supra* note 50, at 1189-96; J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 3-7 (1927).

52. See, e.g., *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (due process requires judicial review of state commission's rate orders); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (attorneys' fees statute applying only to railroads violates equal protection); *Smyth v. Ames*, 169 U.S. 466 (1898) (setting out constitutionally required principles of valuation for rate regulation).

53. See, e.g., *Texas & Pac. Ry. Co. v. ICC*, 162 U.S. 197 (1896); J. DICKINSON, *supra* note 51, at 67-72, 160-61; E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 280-81 (1928); *Interstate Commerce Act of 1887*, ch. 104, § 16, 24 Stat. 379, 384.

54. E. FREUND, *supra* note 53, at 281, 336; J. DICKINSON, *supra* note 51, at 161; *Hepburn Act of 1906*, ch. 3591, § 4, 34 Stat. 584, 589-90.

55. E. FREUND, *supra* note 53, at 281-82; J. DICKINSON, *supra* note 51, at 73-74; *Hepburn Act of 1906*, § 5, 34 Stat. 584.

this rejection. First, in the *Illinois Central Railroad* case,⁵⁶ Justice White insisted that the Court's inalienable⁵⁷ responsibility to limit federal officials to their sphere of lawful authority included the duty to inquire

whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.⁵⁸

Next, in the *Union Pacific Railroad* case, Justice Joseph Lamar, himself a former railroad lawyer,⁵⁹ listed six recognized exceptions to the finality of ICC decisions, including "if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it."⁶⁰

The government tried once more, contending in the *Louisville and Nashville Railroad* case that the statute made the ICC's "opinion" concerning the reasonableness of a rate binding on the courts, "even if the finding was wholly without substantial evidence to support it."⁶¹ Although the Court ultimately upheld the ICC's order, Justice Lamar indignantly rejected this argument. He began loftily:

A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.⁶²

Before finishing, however, he drew on no less than four strands of

56. *ICC v. Illinois Central R.R. Co.*, 215 U.S. 452 (1910).

57. *Id.* at 470 ("the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed").

58. *Id.*

59. See A. BICKEL & B. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 1910-21 41, 203 (1984).

60. *ICC v. Union Pacific R.R. Co.*, 222 U.S. 541, 547 (1912). The other five were that the Commission's order was: "beyond the power which it could constitutionally exercise"; "beyond its statutory power"; "based upon a mistake of law"; "confiscatory and in violation of the constitutional prohibition against taking property without due process of law"; and the "substance, and not the shadow" rule of *Illinois Central*. *Id.*

61. *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 90-91 (1913); see Hepburn Act of 1906, § 15, 34 Stat. 584 ("... Commission ... shall be of the opinion that any of the rates, or charges whatsoever, ... are unjust or unreasonable ...").

62. *Louisville & Nashville R.R. Co.*, 227 U.S. at 91.

administrative law to support judicial review of factfinding.⁶³ First, citing the recently decided *Tang Tun* case, he observed that an adjudicative decision was void if the hearing was manifestly unfair or if the finding was "contrary to the 'indisputable character of the evidence.'"⁶⁴ Second, issues of law were reserved for the decision of the courts.⁶⁵ Third, the Court treated the existence of unreasonable rates as a jurisdictional fact.⁶⁶ Fourth, the Court suggested that it would be a denial of procedural due process for the ICC to rely on its own knowledge rather than on evidence disclosed to the parties.⁶⁷ Justice Lamar did not seem to notice that each of these rationales might justify a different scope of judicial review.

The first rationale, that a finding without some evidence to support it was a constitutionally prohibited exercise in arbitrariness, would seem as applicable to state as to federal regulation. And indeed, after a surprising hesitation,⁶⁸ the Supreme Court soon articulated this test in cases involving state regulation of public utilities.⁶⁹ Its significance was muted, however, because in this "*Lochner* era" most challenges to such regulation could be framed as substantive due process claims. Framing the issue in those terms would permit Supreme Court review of the evidence under either of two doctrines: the doctrine that the sufficiency of the evidence to defeat a federal claim was itself an issue of federal law,⁷⁰ and the then-emerging doctrine of "constitutional fact."⁷¹

For the immediate future, however, the second rationale — that administrative orders without adequate evidentiary support raised issues of law for decision by the courts — proved most fertile. The *Louisville & Nashville* test was repeated in numerous ICC cases,⁷² and its requirement of adequate evidentiary support spread into federal administrative law generally.⁷³ The ICC decisions were promi-

63. *Id.* at 91-94.

64. *Id.* at 91.

65. *Id.* at 92. For a reminder concerning the characterization of evidentiary sufficiency as an issue of law, see section 1 of the Appendix, *see infra* p. 730.

66. *Louisville & Nashville R.R. Co.*, 227 U.S., at 92. For a reminder concerning the jurisdictional fact doctrine, see section 3 of the Appendix, *see infra* p. 733.

67. *Louisville & Nashville R.R. Co.*, 227 U.S. at 93-94.

68. *Louisville & Nashville R.R. Co. v. Finn*, 235 U.S. 601, 606 (1915) (finding sufficient evidence to moot any discussion of the standard of review).

69. *Northern Pac. Ry. Co. v. Dep't. of Public Works*, 268 U.S. 39, 44-45 (1925); *New York ex rel. New York & Queens Gas Co. v. McCall*, 245 U.S. 345, 348-49 (1917).

70. See section 1 of the Appendix, *infra* p. 730.

71. See section 4 of the Appendix, *infra* p. 734.

72. *E.g.*, *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 508 (1931); *New England Divisions Case*, 261 U.S. 184, 203 (1923); *Louisville & Nashville R.R. Co. v. United States*, 238 U.S. 1, 9 (1915); *Florida East Coast Ry. v. United States*, 234 U.S. 167, 185 (1914).

73. See Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026 (1941); Stern, *Review of Findings of Administrators, Judges and Juries: A Com-*

nently quoted in the debates over the Federal Trade Commission Act of 1914, and their standard of review, which was viewed as equivalent to the standard for review of jury trials, was written into the Act in the form of a requirement that the FTC's decisions be "supported by testimony."⁷⁴ In succeeding decades, various other administrative tribunals were made subject to review to ensure that their decisions were "supported by evidence," a phrase that received the same interpretation.⁷⁵ The "supported by evidence" standard figured prominently in the famous case of *Crowell v. Benson*,⁷⁶ where the Supreme Court held that this standard of review of agency factfinding safeguarded the responsibility of Article III judges to decide all issues of law in cases involving "private rights."⁷⁷ By the late 1930's the phrase "supported by substantial evidence" came to be the usual expression of the same idea.⁷⁸ After it was written into the

parative Analysis, 58 HARV. L. REV. 70, 74-79 (1944).

74. See Stason, *supra* note 73, at 1041-44; 51 CONG. REC. 13005-07, 13051-52, 14768 (1914) (statement of Sen. Cummings); *Id.* at 13052 (remarks of Sen. Walsh); *Id.* at 14770 (remarks of Sen. Newlands). Congress also provided, however, a procedure for remand to the FTC for additional fact-finding if good cause was shown; this led the pre-New Deal Supreme Court to be less deferential in dealing with the FTC than with the ICC, *see, e.g.*, *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 580 (1923); Stern, *supra* note 73, at 70.

75. See Stason, *supra* note 73, at 1027-28 (giving as examples Act of Sept. 21, 1922, ch. 356, § 316 (Tariff Commission); Securities Act of 1933, ch. 38, § 9, 48 Stat. 74; National Labor Relations Act of 1935, § 10, 49 Stat. 453; Agricultural Adjustment Act of 1938, § 366, 52 Stat. 63); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

76. 285 U.S. 22 (1932). The statute in question only authorized review of whether the challenged order was "made and served in accordance with law," Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 21(c), 44 Stat. 1424-37, but the Court regarded that as authorizing it to apply the usual "supported by evidence" standard. 285 U.S. at 48; *see id.* at 67-68 (Brandeis, J. dissenting).

77. The Court held that in "private rights" cases between individuals to determine civil liability, the Constitution would permit assignment of ordinary factfinding responsibilities to nonjudicial "adjuncts," so long as Article III courts retained full authority to decide all issues of law, including whether the findings of fact were supported by evidence. The Court also held, however, that independent judicial determination of the facts on which constitutional issues turned must be available. This latter holding has been severely limited by later cases, and the nineteenth-century distinction between "private rights" and "public rights" cases has been increasingly discredited. *See Thomas v. Union Carbide Agricultural Prods. Co., Inc.*, 473 U.S. 568, 585-86 (1985); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983); Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFFALO L. REV. 765 (1986).

78. See Stason, *supra* note 73, at 1027-28 (giving as examples Federal Communications Act of 1934, ch. 652 § 402(e), 48 Stat. 1064, 1094; Public Utility Act of 1935, ch. 687, § 313(b), 49 Stat. 803, 860; Securities Exchange Act of 1934, ch. 404, § 25(a),

APA, the Supreme Court slightly intensified the scope of review.⁷⁹

As a result of these developments, the "some evidence" requirement was rendered redundant in many areas of federal administrative law, given the availability of the less deferential substantial evidence review. Moreover, the relative standardization of terminology by the APA has apparently obscured some of this history. Confusion was evident recently in the *Northern Pipeline* case, where the Supreme Court spectacularly revived *Crowell v. Benson* and struck down the entire bankruptcy court system created by the Bankruptcy Act of 1978.⁸⁰ In reexamining *Crowell's* constitutionally mandated scope of review, the Court misquoted the earlier test as being whether the findings were "supported by the evidence."⁸¹ This led the Court to find the "clearly erroneous" standard, traditionally regarded as less deferential than the substantial evidence test,⁸² constitutionally insufficient for review of bankruptcy court findings of fact.⁸³ Apparently the plurality regarded "supported by the evidence" as signifying "not contrary to the weight of the evidence."⁸⁴ Whether a more accurate understanding of *Crowell* would have changed the outcome in *Northern Pipeline* may be doubted, but the degree to which the Court has lost touch with this history is

48 Stat. 881, 902; Public Utility Act of 1935, ch. 687, § 24(a), 49 Stat. 803, 835; Bituminous Coal Act, ch. 127, § 6(b), 50 Stat. 72, 85 (1937); Fair Labor Standards Act of 1938, ch. 676 § 10(a), 52 Stat. 1060, 1065; Natural Gas Act, ch. 556, § 19(b), 52 Stat. 821, 832 (1938); Food, Drug and Cosmetic Act, ch. 675 § 701(e), 52 Stat. 1040, 1055 (1938); Civil Aeronautics Act of 1938, ch. 601, § 1006(e), 52 Stat. 973, 1024).

79. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

80. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

81. *Id.* at 85 (plurality opinion) (emphasis added); *accord*, 458 U.S. at 102 (White, J., dissenting).

82. See, e.g., 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (2d ed. 1958); L. JAFFE, *supra* note 50, at 615.

83. 458 U.S. at 85 (plurality opinion); *id.* at 98 (Rehnquist, J., concurring). Even the dissenters accepted the view that the standard upheld in *Crowell v. Benson* was less deferential than the clearly erroneous test. *Id.* at 102 (White, J., dissenting).

84. This is how the Court explained *Northern Pipeline* in *CFTC v. Schor*, 106 S. Ct. 3245, 3259 (1986) ("CFTC orders are also reviewed under the same 'weight of the evidence' standard sustained in *Crowell*, rather than the more deferential standard found lacking in *Northern Pipeline*."). See also Young, *supra* note 77, at 860-62. The Court's recent reiteration of this error in *CFTC v. Schor* did not lead its analysis astray because the relevant statute *did* authorize inquiry into whether the agency's decision was "supported by the weight of the evidence." See 7 U.S.C. § 9 (1982); *Maloley v. R.J. O'Brien & Assoc., Inc.*, 819 F.2d 1435, 1439 n.2 (8th Cir. 1987); *Great Western Food Distributors, Inc. v. Brannan*, 201 F.2d 476, 479 (7th Cir. 1953), *cert. denied*, *Great Western Food Distributors v. Benson*, 345 U.S. 997 (1953). The D.C. Circuit, however, has been backed into an untenable corner by *Northern Pipeline's* misreading, while attempting to sort out standards of review in post-*Northern Pipeline* bankruptcy and administrative law. See *In re AOV Industries, Inc.*, 792 F.2d 1140, 1146 (D.C. Cir. 1986) (upholding substantial evidence review of bankruptcy court findings as more demanding than the clearly erroneous test); *Kalaris v. Donovan*, 697 F.2d 376, 387 n.38 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119 (1983), *reh'g denied*, 463 U.S. 1236 (1983) (recognizing that *Crowell* involved the substantial evidence test, and attempting to explain why *Northern Pipeline* found the clearly erroneous test inadequate).

remarkable.

C. *The Selective Service Cases*

When the New Deal era was succeeded by the Second World War, a new occasion for the application of the "some evidence" standard appeared. The Selective Training and Service Act of 1940 authorized military conscription, administered by a system of civilian local boards. The statute purported to confer finality on the local boards' decisions, including classification determinations, orders to report for induction into the armed forces, and orders to report for alternative civilian service.⁸⁵ The federal courts had traditionally permitted those who complied with allegedly invalid induction orders to seek release from the military in a habeas corpus proceeding.⁸⁶ But the statute made no provision for judicial review of the legality of the order, even in the course of a federal criminal prosecution for failure to comply.⁸⁷ In early 1944, in *Falbo v. United States*,⁸⁸ the Supreme Court held that an individual charged with failure to report for civilian service could not raise the illegality of his draft classification as a defense. The Court insisted that the national defense required "a prompt and unhesitating obedience to orders," and that to entertain the defense of invalidity in this context would permit "litigious interruption" of the mobilization process.⁸⁹ Once the war ended, however, the Supreme Court drew back from the brink of unquestioning enforcement of administrative orders,⁹⁰ and interpreted *Falbo* as a decision solely about exhaustion of administrative remedies.⁹¹ In *Estep v. United States*,⁹² the Court opened the door to narrow judicial review of local board decisions, in a criminal prosecution for failure to *submit* to induction after exhaustion of administrative remedies, as well as on habeas corpus after submission to induction.

85. The Selective Training & Service Act of 1940, ch. 720, § 10(a) (2), 54 Stat. 885, 893.

86. See *Estep v. United States*, 327 U.S. 114, 123-24 (1946).

87. See *id.* at 119. ("Congress enlisted the aid of the federal courts only for enforcement purposes.").

88. 320 U.S. 549 (1944).

89. *Id.* at 554.

90. See *id.* at 558 (Murphy, J., dissenting); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1380-81 (1953).

91. See *Estep v. United States*, 327 U.S. 114, 123 (1946).

92. *Id.* at 123-25.

Estep, like *Falbo* before it⁹³ and like a series of cases to follow,⁹⁴ involved religious exemption claims of Jehovah's Witnesses. The aggressive evangelism of the Jehovah's Witnesses had sparked hostility in the United States, and for so small a sect they had played a very large role in the Supreme Court's civil liberties decisions of the preceding decade.⁹⁵ The Jehovah's Witnesses posed particular problems for the selective service system. Their religious views forbade them to serve in the armies of worldly governments.⁹⁶ Rather than applying for exemption as conscientious objectors, which would entail alternative civilian service, many claimed exemption as "ministers of religion."⁹⁷ The unconventional structure of the sect and the evangelical obligations imposed on all its members, complicated the bureaucracy's task of applying the minister/congregation distinction it had abstracted from more traditionally organized religions. In fact, as the Supreme Court recognized, "it is the doctrine of the Jehovah's Witnesses that all are ministers."⁹⁸ The selective service apparatus became suspicious that "ministerial" vocations were being fabricated for the purpose of avoiding military or civilian service, particularly when the increase in young men's evangelical activities correlated with the approach of likely conscription.⁹⁹ The gap between the gov-

93. See 320 U.S. at 556-57 (Murphy, J., dissenting) (citing "the remark attributed to one of the members of petitioner's local board to the effect that 'I do not have any damned use for Jehovah's Witnesses.'").

94. *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1955); *Sicurella v. United States*, 348 U.S. 385 (1955); *Witmer v. United States*, 348 U.S. 375 (1955); *Dickinson v. United States*, 346 U.S. 389 (1953); *Cox v. United States*, 332 U.S. 442 (1947); *Sunal v. Large*, 332 U.S. 174 (1947); *Gibson v. United States*, 329 U.S. 338 (1946).

95. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (upholding right of Jehovah's Witness not to salute the flag); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating ordinance prohibiting door-to-door canvassing); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating tax on sale of religious literature); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (overturning breach of peace conviction); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating permit requirement for religious solicitation); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (invalidating permit requirement for distribution of pamphlets). These were the victories; for losses see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

96. See *Sicurella*, 348 U.S. at 390-91; Elliff, *Jehovah's Witnesses and the Selective Service Act*, 31 VA. L. REV. 811 (1945) (expressing governmental perspective on treatment of Jehovah's Witnesses in the Second World War); Tietz, *Jehovah's Witnesses: Conscientious Objectors*, 28 S. CAL. L. REV. 123 (1955) (expressing defense perspective on treatment of Jehovah's Witnesses up through the Korean War).

97. See Elliff, *supra* note 96, at 813; Tietz, *supra* note 96, at 125-26; *Falbo v. United States*, 320 U.S. 549, 550 (1944); The Selective Training & Service Act of 1940, §§ 5(g) (conscientious objector), 5(d) (regular or duly ordained ministers of religion).

98. *Witmer v. United States*, 348 U.S. 375, 382 n.4 (1955); Elliff, *supra* note 96, at 813-16.

99. See Elliff, *supra* note 96, at 815, 818-20; see *Cox v. United States*, 332 U.S. 442, 451 (1947). In this connection it may be worth noting Robert Rabin's conclusion, at a later period, that the local board system inherently recruits decisionmakers hostile to conscientious objectors. Rabin, *A Strange Brand of Selectivity: Administrative Law Per-*

ernment's and the registrants' perceptions was large: four thousand Jehovah's Witnesses were convicted during the Second World War for failure to submit to induction or alternative service.¹⁰⁰

Estep and Smith had been denied the draft classification designated for ministers of religion by their local draft boards.¹⁰¹ After exhausting all administrative remedies, both refused induction. Although Estep claimed that his classification was arbitrary and procedurally defective, and Smith claimed that his local board acted without any foundation of fact, and discriminated against him because he was a Jehovah's Witness, they were ultimately convicted of violating the Selective Service Act, without any hearing on the legality of their classifications.¹⁰²

The Supreme Court reversed the convictions, holding that the finality provision should not be construed as precluding all judicial review. Justice Douglas seized on the language of the statute conferring on the local boards power "within their respective jurisdictions," as a basis for permitting review of a local board's action "so contrary to its granted authority as to exceed its jurisdiction."¹⁰³ He refused to believe that Congress would punish resistance to the boards' orders "no matter how flagrantly [the boards] violated the rules and regulations which define their jurisdiction."¹⁰⁴ As to findings of fact, the Court held that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."¹⁰⁵ While this "basis in fact" articulation was new, and became a stock phrase in selective service law,¹⁰⁶ the Court equated the standard of review with the one it had come to employ in the immigration cases, i.e., the "some evidence" requirement.¹⁰⁷

spectives on the Processing of Registrants in the Selective Service System, 17 UCLA L. REV. 1005, 1019 (1970).

100. See Elliff, *supra* note 96, at 811 (2,519 convictions for failure to submit to induction; 1,456 convictions for failure to perform alternative service); Tietz, *supra* note 96, at 123 n.2 (Jehovah's Witnesses constituted over two-thirds of all religious objectors in prison).

101. See, e.g., *Dickinson v. United States*, 346 U.S. 389 (1953).

102. *Estep v. United States*, 327 U.S. 114, 116-17 (1946).

103. *Id.* at 120.

104. *Id.* at 121.

105. *Id.* at 122-23 (footnote omitted).

106. See *Parisi v. Davidson*, 405 U.S. 34 (1972); *Witmer v. United States*, 348 U.S. 375, 381 (1955); *Dickinson v. United States*, 346 U.S. 389, 390 (1953); *Cox v. United States*, 332 U.S. 442, 452 (1947). In 1967, Congress wrote the "no basis in fact" standard into the statute. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 8(c), 81 Stat. 100, 104 [hereinafter *Selective Service Act*].

107. *Id.* at 123 n.14 (citing, *inter alia*, *Chin Yow*, *Vajtauer*, and *Bridges*); see also *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 311-12 (1946) (citing *inter alia*,

The Court merely remanded for further proceedings in *Estep*, rather than evaluate the “basis in fact” for the orders itself.¹⁰⁸ But the Court confirmed the narrow reach of the standard in subsequent cases,¹⁰⁹ not finding a classification order without “basis in fact” until the *Dickinson* case in 1953.¹¹⁰

Dickinson was yet another Jehovah’s Witness who claimed a ministerial exemption. Although at the time of his original claim of exemption he was working forty hours a week as a radio repairman in addition to his preaching, he subsequently left his job to become the “‘Company Servant’ or presiding minister of the Coalinga, California, ‘Company.’”¹¹¹ He received baptism, which constituted his ordination.¹¹² His duties as Company Servant took up 150 hours per month, and he supported himself by working five hours a week on radio repair.¹¹³ The local board denied his renewed claim for ministerial exemption without giving reasons.

After exhausting his administrative remedies Dickinson refused to submit to induction, for which he was prosecuted and convicted. The court of appeals found a basis in fact for the board’s rejection in “Dickinson’s youth, the unorthodox method of ordination by baptism, the failure to present stronger documentary evidence from Watchtower Society leaders, and the customary claim of Jehovah’s Witnesses to ministerial exemptions.”¹¹⁴ The Supreme Court majority, while eschewing a “test of ‘substantial evidence,’ ”¹¹⁵ concluded that the local board had acted “solely on the basis of suspicion and speculation [in a manner] both contrary to the spirit of the Act and foreign to our concepts of justice.”¹¹⁶

Tisi, Vajtauer, and Bridges).

108. 327 U.S. at 125.

109. *Witmer v. United States*, 348 U.S. 375, 380-83 (1955) (“Nor should they look for substantial evidence to support such determinations.”); *Cox v. United States*, 332 U.S. 442, 451-53 (1947); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312, 316-17 (1946); *Eagles v. United States ex rel. Horowitz*, 329 U.S. 317, 321-22 (1946).

110. *Dickinson v. United States*, 346 U.S. 389 (1953).

111. *Id.* at 392-93.

112. *Id.* at 392.

113. *Id.* at 393; see *Tietz*, *supra* note 96, at 130-31 (discussing time demands of ministry and secular work for subsistence).

114. 346 U.S. at 396; see *Dickinson v. United States*, 203 F.2d 336, 343-44 (9th Cir. 1953), *rev’d*, 346 U.S. 389 (1953). Of course, if youth, ordination by baptism, and the frequency of claims to ministerial status constituted a “basis in fact” for denying the exemption, then no “young” Jehovah’s Witness could ever prevail.

115. 346 U.S. at 396; but see 4 K. DAVIS, *supra* note 82, § 29.07 (1958) (arguing that the Court’s factual inquiry in *Dickinson* was even more intrusive than the substantial evidence test).

116. 346 U.S. at 396-97. Three dissenters, who had not been part of the Court majority in *Estep*, argued that the “basis in fact” test was misguided, and that factual issues should be left wholly to the selective service system. 346 U.S. at 397-401 (Jackson, Burton, & Minton, JJ., dissenting).

When it first appeared, *Estep* represented a powerful statement of the need for "some evidence" review. Over the years, as judicial review of selective service determinations has become more available,¹¹⁷ the "basis in fact" standard has come to appear anomalously narrow.¹¹⁸ As originally written, however, *Estep* purported to limit judicial review of classification decisions to "jurisdictional" issues, including actions flagrantly in excess of legal authority, but not "mere" errors of law.¹¹⁹ So long as the Court limited itself to such narrow review,¹²⁰ *Estep* was noteworthy for its application of the "some evidence" requirement to federal agencies whose actions were not subject to judicial correction when they were legally erroneous, but only when they were "in defiance of the law."¹²¹

D. Thompson v. City of Louisville and Its Era

The next extension of the "some evidence" requirement, though entirely logical, was an event "unique in the annals of the Court."¹²² The Supreme Court granted a writ of certiorari to the Police Court of Louisville, Kentucky and reversed a petty criminal conviction on the ground that the record was "totally devoid of evidentiary sup-

117. See, e.g., *McKart v. United States*, 395 U.S. 185 (1969) (excusing failure to exhaust administrative remedies and correcting Selective Service System's interpretation of "surviving son" exemption); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968) (permitting preinduction judicial review and rejecting Selective Service System's delinquency regulations); *Sicurella v. United States*, 348 U.S. 385 (1955) (rejecting Selective Service System's interpretation of conscientious objection to war as error of law); see generally Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 UCLA L. REV. 908 (1970).

118. See, e.g., Hansen, *The Basis-in-Fact Test in Judicial Review of Selective Service Classifications: A Critical Analysis*, 37 BROOKLYN L. REV. 453 (1971). Now that the "basis in fact" test is statutorily imposed, see Selective Service Act, *supra* note 106, this anomaly is unlikely to be removed by the Court. In *Parisi v. Davidson*, 405 U.S. 34 (1972), the Court extended the "basis in fact" test to habeas review of military decisions denying discharge to members of the armed forces who become conscientious objectors after their induction.

119. See 327 U.S. at 120-21; *id.* at 123 (citing *Goff v. United States*, 135 F.2d 610, 612 (4th Cir. 1943) ("That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right.")); see also *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 311-12, 315 (1946); *Sicurella v. United States*, 348 U.S. 385, 393 (1955) (Minton, J., dissenting).

120. As Justice Frankfurter had warned in *Estep* itself, the concept of "jurisdictional" error in administrative law has always proved unstable. *Estep v. United States*, 327 U.S. 114, 142-43 (1946) (Frankfurter, J., concurring); see Section 3 of the Appendix, *infra*, p. 733.

121. 327 U.S. at 121.

122. *Garner v. Louisiana*, 368 U.S. 157, 190 (1961) (Harlan, J., concurring).

port" for findings of guilt under the city's own ordinances.¹²³

Sam Thompson had been arrested for loitering after a police officer found him "dancing by himself" in the equivocally named Liberty End Cafe, where he was waiting for a bus.¹²⁴ The cafe's manager had told the officer that Thompson had been there for half an hour and had not bought anything.¹²⁵ When Thompson protested the arrest, he was also charged with disorderly conduct.¹²⁶ It turned out that Thompson had been arrested on fifty-four previous occasions.¹²⁷ The Police Court convicted Thompson on this meager evidence¹²⁸ and fined him \$10 on each count, less than the jurisdictional amount for any kind of review in the Kentucky court system.¹²⁹ Thompson sought review in the United States Supreme Court. He emphasized not only that he had been wrongfully convicted, but also that the conviction cut him off from any possibility of subsequent redress for an utterly arbitrary arrest.¹³⁰

Thompson had been represented throughout by Louis Lusky, and a reading of Lusky's submissions at trial, his petition for certiorari, and his brief on the merits reveals significant aspects of Thompson's claim that the Supreme Court did not trouble to mention.¹³¹ First, the Petition for Certiorari argued that Thompson was being intentionally exposed to continuing harassment by the police, and that the judge's overriding concern at trial was to protect the arresting officer from civil liability for an unfounded arrest. For this purpose, the judge had not only refused to acquit, but had deliberately set a fine too low to appeal.¹³² The Brief maintained this claim, but also provided a somewhat less sensational explanation: the Louisville Police Court had a docket of 25,000 cases per year, and the trial judge had

123. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

124. *Id.* at 199-200. Cf. H. Melville, *Billy Budd Sailor*, in HERMAN MELVILLE: PIERRE ISRAEL POTTER, *THE CONFIDENCE MAN TALES & BILLY BUDD* 1350 (1984). ("And good-bye to you too, old *Rights of Man*.").

125. 362 U.S. at 200.

126. *Id.*

127. *Id.*

128. The transcript of Thompson's trial fleshes out the circumstances of his arrest to a slightly greater degree; the description in the text is derived from Justice Black's opinion. At one point, the trial judge stated that, from prior trials, he could take judicial notice that Thompson was fond of alcohol. Record at 18.

129. 362 U.S. at 202.

130. *Id.* at 201 n.2.

131. I will discuss (much) later the significance of the Supreme Court's silence regarding Thompson's allegations against the trial judge. Thompson's race (he is referred to in the record as a "colored" man, *see* Record at 36) was not identified as a factor; the brief paints a picture of harassment of the poor, but does not raise the spectre of intentional racial discrimination. The Court's opinion does mention Thompson's allegation that his *arrest* was in retaliation for exercising his right to defend against baseless arrests in the past, and that a conviction would bar his civil remedies, 362 U.S. at 200-01 n.2, but no claim that the trial judge was implicated in any alleged reprisal.

132. Brief at 58-61; Petition for Certiorari at 21-22.

simplified his task by adopting a "rule" of accepting the arresting officer's assessment of guilt whenever a defendant had a prior arrest record.¹³³ In fact, at both the trial in question and an earlier trial on similar charges, this judge had identified Thompson's prior arrests as crucial evidence against him.¹³⁴ Thus, Lusky argued,

no "hearing" is available, in the meaningful sense of the term, because the evidence and arguments adduced on his behalf are disregarded as completely as if they had not reached the judge's ears; for him a trial is but a formal prelude to a foreordained result.¹³⁵

Finally, Thompson's arrest for his now-famous "dance" may be seen in the context of the Warren Court's developing uneasiness with the exercise of police discretion under vague and overbroad vagrancy statutes.¹³⁶

Against this background, Justice Black for a unanimous Court entered into a close examination of Kentucky law on loitering and disorderly conduct. He read the Louisville loitering ordinance as precluding a conviction unless there was a showing that Thompson could not "give a satisfactory account of himself" and that he was in the cafe without the manager's consent.¹³⁷ Justice Black recognized that the constitutional inquiry "turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."¹³⁸ But he found "no semblance of evidence from which any person could reasonably infer" that the elements of the loitering offense had been proven.¹³⁹ Similarly, he found that the only evidence of disorderly conduct was the policeman's characterization of Thompson as "very argumentative."¹⁴⁰ Since merely arguing with a policeman could not be "disorderly conduct,"¹⁴¹ there was no evidence underlying this conviction.¹⁴²

Justice Black concluded that Thompson's conviction violated due process.¹⁴³ He treated the "some evidence" test as well established,

133. Brief at 25-27.

134. *Id.* at 25-26 (citing Record at 31, 63).

135. *Id.* at 52.

136. *Id.* at 62; Petition for Certiorari at 24; see Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 66-68 (1968).

137. *Thompson*, 362 U.S. at 204.

138. *Id.* at 199.

139. *Id.* at 205.

140. *Id.*

141. *Id.* at 206 (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (statute criminalizing membership in a "gang" unconstitutionally vague)).

142. *Id.*

143. *Id.* (citing, *inter alia*, *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927)).

and its application to state court decisions as unremarkable.¹⁴⁴ He hinted at a rationale by citing without elaboration a string of precedents, mostly joined by a common emphasis on the need for a meaningful trial at which evidence of the crime charged would be evaluated on its merits.¹⁴⁵

Thompson was the first case in which the Supreme Court overturned a state court conviction for lack of any evidence, but at least the state court in question was a very minor lower tribunal. This may help to explain why Justice Black said so little to justify the freedom of his reasoning in construing Louisville's ordinances in a manner that exposed the paucity of evidence in the record. While he buttressed his treatment of the "disorderly conduct" ordinance by hinting at the vagueness problems that a broader interpretation would create,¹⁴⁶ he offered no such excuse for his elaboration of the elements of "loitering."¹⁴⁷

The *Thompson* approach to interpretation of state statutes became more controversial shortly thereafter, when the Supreme Court began reversing convictions that had been sustained on the merits by state supreme courts.¹⁴⁸ The "some evidence" requirement became a major tool in civil rights cases, permitting the Court to reverse state

144. See *id.* at 204 ("The city correctly assumes here that if there is not support for these convictions in the record they are void as denials of due process."); *id.* at 206 ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."). (Footnotes omitted).

145. Justice Black cited *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) (validity of conviction must be judged on basis of charge actually made, since due process would forbid punishment on any other basis); *Cole v. Arkansas*, 333 U.S. 196 (1948) (same); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (former Communist cannot be denied bar admission without some showing of bad moral character); *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927) (applying "some evidence" requirement to deportation decision); *Moore v. Dempsey*, 261 U.S. 86 (1923) (trial dominated by mob violates due process); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (city ordinance lending itself to racially discriminatory enforcement violates equal protection); *Akins v. Texas*, 325 U.S. 398, 402 (1945) (state court's findings entitled to respect unless so lacking in support as to work fundamental unfairness); *Tot v. United States*, 319 U.S. 463, 473 (1943) (Black, J., concurring) (baseless presumption that weapon moved in interstate commerce deprives defendant of trial); and *Mooney v. Holohan*, 294 U.S. 103 (1935) (conviction obtained through prosecutor's knowing use of perjured evidence affords only "a pretense of a trial").

146. See 362 U.S. at 206 (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (statute criminalizing membership in a "gang" unconstitutionally vague)).

147. See *id.* at 204-05; but see, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (applying vagueness doctrine to invalidate Florida vagrancy statute); *Johnson v. Florida*, 391 U.S. 596 (1968) (avoiding vagueness challenge to Florida vagrancy statute by reversing for lack of evidence to support conviction).

148. For controversy, see *Garner v. Louisiana*, 368 U.S. 157, 187 (1961) (Harlan, J., concurring in the judgment); *Johnson v. Florida*, 391 U.S. 596, 599 (1968) (White, J., dissenting); *Vachon v. New Hampshire*, 414 U.S. 478, 487 (1974) (Rehnquist, J., dissenting); Note, *No Evidence to Support a Conviction - The Supreme Court's Decisions in Thompson v. City of Louisville and Garner v. Louisiana*, 110 U. PA. L. REV. 1137 (1962).

court convictions of demonstrators where evidence was purportedly lacking on some element of the offense.¹⁴⁹ The Court was particularly anxious in this period not to put its moral authority behind convictions for sit-ins at places of public accommodation.¹⁵⁰ Some of these "some evidence" holdings facilitated avoidance of first amendment or equal protection questions,¹⁵¹ while others could have been reached by employing settled first amendment law and constitutional fact review.¹⁵² The *Thompson* technique became closely associated with a complementary tool, the holding in *Bouie v. City of Columbia*¹⁵³ that a state court violates due process when it unforeseeably expands its interpretation of a criminal statute in the course of a prosecution. Together, *Thompson* and *Bouie* limit the ability of a hostile state court to manipulate the facts and the law to ensure a defendant's conviction. Less suspiciously put, they afford protection against wholly unforeseeable punishment for previously lawful conduct.¹⁵⁴

This intrusion into the process of construing state law has attracted criticism to *Thompson*. Of course, the Supreme Court has long found it necessary to guard against deviant interpretations of state law in other contexts where federal rights are at stake.¹⁵⁵ But some commentators, unconvinced of *Thompson's* lengthy due process

149. See *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (no evidence of disorderliness); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (no evidence that officer was directing vehicular traffic); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (no evidence of breach of the peace); *Garner v. Louisiana*, 368 U.S. 157 (1961) (finding no evidence that sit-in would foreseeably "disturb or alarm the public"); see also *Peterson v. City of Greenville*, 373 U.S. 244, 259 (1963) (Harlan, J., concurring) (no evidence that petitioner encouraged violation of ordinance).

150. See, e.g., B. SCHWARTZ, UNPUBLISHED OPINIONS OF THE WARREN COURT 143-48, 187-89 (1985); Paulsen, *The Sit-in Cases of 1964. "But Answer Came There - None"* 1964 SUP. CT. REV. 137.

151. See *Barr v. City of Columbia*, 378 U.S. 146 (1964) (avoiding state action question in sit-in case); *Garner v. Louisiana*, 368 U.S. 157 (1961) (avoiding free speech and state action questions in sit-in case); cf. *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (avoiding first amendment issue outside civil rights context).

152. See *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) ("Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."); cf. *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (bypassing "some evidence" issue and applying constitutional fact doctrine to overturn breach of peace conviction as first amendment violation).

153. 378 U.S. 347 (1964).

154. See *id.* at 350; *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (*Bouie* and *Thompson* combine to condemn "unforeseeable" parole revocation); P. BATOR, P. MISHKIN, D. SHAPIRO & M. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 617 (2d ed. 1973).

155. See, e.g., P. BATOR, *supra* note 154, 500-05.

pedigree, have questioned the need for such intrusion in "no evidence" cases.¹⁵⁶

In addition to demonstrating its usefulness in cases implicating other constitutional values, the Court continued to regard the *Thompson* "some evidence" standard as a requirement of due process in ordinary criminal cases.¹⁵⁷ The Court also applied the standard to a state court's revocation of probation for failure to report an arrest in *Douglas v. Buder*.¹⁵⁸ And, analogously, it held the disciplinary proceedings of labor unions to the same standard, finding that Congress intended to protect their powers of self-government by requiring only the "usual reasonable constitutional basis."¹⁵⁹

Eventually, *Thompson* lost its role in review of state criminal convictions, because it was superseded by a stricter standard. After the Court had constitutionalized the requirement of proof beyond a reasonable doubt,¹⁶⁰ it sought a standard of review commensurate with that extraordinary burden of proof. In *Jackson v. Virginia*,¹⁶¹ emphasizing that the "some evidence" rule did not test sufficiency of evidence,¹⁶² the Court held that criminal defendants were entitled to habeas corpus review to ensure that the evidence on which they were convicted was sufficient to permit a reasonable factfinder to find guilt beyond a reasonable doubt. "Some evidence" review of state court decisions remains potentially applicable, however, in direct review of other state court proceedings, as well as in collateral attack on judgments leading to confinement.¹⁶³

E. "Some Evidence" in Prison: Superintendent v. Hill

The "due process explosion"¹⁶⁴ created opportunities to apply the "some evidence" requirement to decisions of a wide variety of state administrative entities previously exempt from federal review. Dur-

156. *Id.* at 615; Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1058 (1977); Note, *supra* note 148, at 1137.

157. See, e.g., *Johnson v. Florida*, 391 U.S. 596, 598 (1968); *Anderson v. United States*, 417 U.S. 211, 223 n.12 (1974); *California v. Green*, 399 U.S. 149, 163 n.15 (1970).

158. 412 U.S. 430 (1973).

159. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 246 (1971).

160. *In re Winship*, 397 U.S. 358 (1970).

161. 443 U.S. 307 (1979). See also section 2 of the Appendix, *infra* p. 732.

162. 443 U.S. at 314; see also *Freeman v. Zahradnick*, 429 U.S. 1111, 1114 (1977) (Stewart, J., dissenting from denial of certiorari); *Pilon v. Bordenkircher*, 444 U.S. 1 (1979) (reversing habeas decision that applied the *Thompson* standard for application of *Jackson v. Virginia* standard).

163. For example, "some evidence" would appear to remain the relevant standard for constitutional review of probation revocation decisions as in *Douglas v. Buder*. Since the reasonable doubt standard of *Winship* does not apply, *Jackson v. Virginia* is irrelevant.

164. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

ing this period, some legal writers expressed doubts about the proper reach of the standard. One noted textbook, for example, suggested that "the no-evidence doctrine has been developed and applied only in criminal cases."¹⁶⁵ Additionally in *Wood v. Strickland*,¹⁶⁶ reversing on the merits the Eighth Circuit's application of the doctrine to overturn a public school board's suspension decision, Justice White found it unnecessary to reach the "applicability of *Thompson* in this setting."¹⁶⁷

Thus, there was reason to fear that the broad historical foundation for "some evidence" as a due process requirement was being forgotten. This made the Supreme Court's 1985 reaffirmation of the standard in *Superintendent v. Hill*¹⁶⁸ particularly welcome. In *Hill*, the Court upheld application of the "some evidence" standard to review of the findings of a prison disciplinary board. It may be useful to bear in mind the Court's characterization of such boards in another case decided the same year, denying board members absolute immunity from constitutional damage claims:

Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee. It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.¹⁶⁹

Hill and Crawford were inmates in a Massachusetts prison who had been subjected to disciplinary proceedings for assaulting another inmate, Stevens. The only evidence of their guilt was the testimony of a guard. The guard testified that he had heard a voice call out

165. P. BATOR, *supra* note 154, at 618.

166. 420 U.S. 308 (1975).

167. *Id.* at 323; see also Wechsler, *supra* note 156, at 1058.

168. 472 U.S. 445 (1985).

169. *Cleavinger v. Saxner*, 474 U.S. 193, 203-04 (1985) (citations omitted). See also Branham, *Implementing and Ignoring the Dictates of the Supreme Court: A Comparative Study of Michigan and Illinois Prison Disciplinary Proceedings*, 12 NEW ENG. J. CRIM. & CIV. CONFINEMENT, 197, 309-11, 315-16 (1986); Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. CRIMINOLOGY & POL. SCI. 200, 210-13 (1972); Jacob & Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System*, 12 STETSON L. REV. 1, 92-97 (1982).

from a walkway, and had immediately gone to the scene where he found Stevens, his face swollen and bleeding. Three other inmates (including Hill and Crawford) were jogging away together. There were no other inmates in the enclosed area. The apparent victim submitted written statements that the others had not caused his injuries. Hill and Crawford maintained their innocence, but were found guilty by the prison disciplinary board; the board directed that each lose 100 days of good time and be confined in isolation for 15 days.

The Massachusetts Superior Court overturned the disciplinary proceeding, finding no evidence to support a conclusion that Hill and Crawford were anything other than innocent witnesses to an assault on Stevens by the fourth inmate. The Supreme Judicial Court of Massachusetts affirmed. The United States Supreme Court granted certiorari, and reversed.¹⁷⁰ The Court held that the state courts had rightly perceived "some evidence" as a due process requirement. Citing cases involving revocation of probation, denial of admission to the bar, and deportation, Justice O'Connor stated: "In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of *an important liberty interest* violates due process if the decision is not supported by any evidence."¹⁷¹ This language may or may not suggest that the Court is less sure about the continued applicability of the "some evidence" requirement to "less important" liberty interests or to property interests.¹⁷² Justice O'Connor concluded that the record regarding Hill and Crawford was "not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary."¹⁷³ Disturbingly, she stated that the standard "does not require examination of the entire record,"¹⁷⁴ apparently illustrating this conception by failing to take into account Stevens' statement that Hill and Crawford had not assaulted him.¹⁷⁵

170. See *Hill*, 472 U.S. at 457-58 (Stevens, J., dissenting in part) (criticizing Court's willingness to decide the case).

171. *Id.* at 455 (emphasis added) (citing *Douglas v. Buder*, 412 U.S. 430 (1973); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957); and *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927)).

172. But see, e.g., *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913) ("some evidence" test applies to railroad rate order); *Lloyd Sabaudo SpA v. Elting*, 287 U.S. 329 (1932) ("some evidence" test applies to fines against steamship companies for bringing inadmissible aliens to port).

173. 472 U.S. at 457.

174. *Id.* at 455.

175. *Id.* at 456. Of course, there could be significant reasons for discrediting the victim's statement in the prison context. But the Court's failure even to mention the statement and the tenability of grounds for discrediting it in its analysis of whether or not some evidence existed, particularly given its admission that the evidence favoring the board's conclusion was "meager," suggests a very loose definition of the standard. The Court had not been so inattentive to the bases of credibility determinations in the immigration and draft cases. See *Tang Tun v. Edsell*, 223 U.S. 673, 681-82 (1912); *Dickinson*

III. THE NATURE OF THE "SOME EVIDENCE" REQUIREMENT

The foregoing history chronicles the Court's continuing perception of a need to scrutinize decisions for "some evidence" that supports them. I will examine the justification and scope of this "some evidence" requirement, but before that can be done it is necessary to understand the nature of the requirement and the functions it serves. In one sense the function of the requirement is easily stated: it is a guarantee of "due process," and protects against "arbitrary" decisions.¹⁷⁶ But these labels cover a multitude of sins. Arbitrariness, for example, is not so much a concept as a fertile soil from which entire families of concepts grow. Perhaps the "some evidence" requirement needs to be left equally imprecise, and we would impair its future generative power if we sought to specify more carefully its content. I believe, however, that a more precise specification can be made of the "some evidence" requirement as it has existed thus far, by applying reason to the features that its history reveals. And I believe that the purpose of the "some evidence" requirement — and its survival for the future — is better served by a fuller articulation. I will begin by pointing out some important characteristics of the requirement that help in explaining its nature, and then I will examine a number of likely and less likely functions that the requirement might serve.

A. *Three Important Characteristics of the "Some Evidence" Requirement*1. *The "Some Evidence" Requirement Is Independent of any Power of the Reviewing Court to Correct Errors of Law or to Limit the Original Decisionmaker to Its Properly Delegated Authority*

The first important characteristic of the constitutional "some evidence" requirement is that the federal courts have often employed it to review the evidentiary basis of rulings by decisionmakers whose decisions on issues of law the court would not or could not review de novo. The state criminal cases, cases involving state administrative agencies, and the selective service cases¹⁷⁷ all illustrate the fact that

v. United States, 346 U.S. 389, 396 (1953) (rejecting view that "the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence").

176. See *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913).

177. See *supra* notes 85-121 and accompanying text. See also the union discipline case, *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971).

the Supreme Court will apply the "some evidence" standard to decisions reached in independent or semi-independent adjudicative systems. Although the "some evidence" doctrine clearly grew out of supervision of inferior tribunals by courts with superior authority to decide issues of law,¹⁷⁸ a field where it is now largely redundant, the doctrine quickly grew beyond that. American federalism does not assign the federal courts the job of correcting erroneous interpretations of state law by state tribunals.¹⁷⁹ The "some evidence" rule therefore serves a function other than that of preventing a decisionmaker from concealing its departures from correct legal interpretation behind strained findings of fact.

Similarly, the scope of the "some evidence" rule goes beyond the function of limiting government bodies to the authority delegated to them by the legislature. The federal constitution does not impose on state government a separation of powers regime comparable to the federal one. While the "Republican Form of Government" Clause creates some (reputedly nonjusticiable) limits on state political organization,¹⁸⁰ and while the due process and bill of attainder clauses may carve out a small sphere necessarily assigned to the state judiciary,¹⁸¹ these are limited exceptions to a general practice of leaving the structure of state governments to the states.¹⁸² Nor are the federal courts normally authorized to vindicate their own interpretations of whatever separation of powers limitations the state itself creates.¹⁸³ Thus, if a state administrative agency exercises authority in excess of that delegated to it by the state legislature, that fact in itself does not create a federal question. If the state courts "erroneously" uphold the agency's usurpation of authority, then the federal courts must treat the agency's actions as authorized under state

178. See *Tang Tun v. Edsell*, 223 U.S. 673 (1912) (federal control of immigration); *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913) (ICC railroad regulation).

179. See, e.g., *Beck v. Washington*, 369 U.S. 541 (1962); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). There are some circumstances, however, in which unforeseeable state law interpretations may raise due process issues, *Bouie v. City of Columbia*, 378 U.S. 347 (1964), or a federal court may find it necessary to scrutinize state law interpretation to prevent circumvention of federal rights. *Terre Haute & I. R.R. v. Indiana ex rel. Ketcham*, 194 U.S. 579 (1904).

180. See J. ELY, *DEMOCRACY AND DISTRUST* 118-25 (1980).

181. See, e.g., *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (due process requires judicial review of administrative rate determination); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (bill of attainder clause forbids legislative punishment of alleged Confederate sympathizers); see also Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

182. See e.g., *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion); *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937); *Dreyer v. Illinois*, 187 U.S. 71 (1902).

183. See, e.g., *Sweezy*, 354 U.S. at 257 (Frankfurter, J., concurring); *Highland Farms Dairy*, 300 U.S. 608; *Dreyer*, 187 U.S. 71.

law.¹⁸⁴ No administrative law theory of "jurisdictional error" can account for application of the "some evidence" rule to state decisionmakers.

2. *"Some Evidence" Means Less Than "Sufficient" Evidence, but More Than Just the Opposite of no Evidence Whatsoever*

The Supreme Court has emphasized on numerous occasions that the "some evidence" test does not authorize a court to inquire into the "sufficiency" of the evidence to sustain the finding.¹⁸⁵ The test is less intrusive than the "substantial evidence" test, as articulated in the 1930s to require evidence sufficient as a matter of law.¹⁸⁶ Yet despite the Court's use of rhetoric suggesting that any evidence whatsoever will satisfy the "some evidence" requirement,¹⁸⁷ its application of the test makes clear that the phrase cannot be taken literally — the smallest quantum of relevant evidence will not suffice.

This is hardly surprising given modern notions of relevancy.¹⁸⁸ If

184. See, e.g., *Atchison, T. & S.F. Ry. v. Railroad Comm'n*, 283 U.S. 380, 390-91 (1931); *Atlantic Coast Line R.R. Co. v. North Carolina Corp. Comm'n*, 206 U.S. 1, 21 (1907); see *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940) (Frankfurter, J.) ("settled state practice cannot supplant constitutional guarantees, but it can establish what is state law"); but see *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957) (plurality opinion) (requiring clear authorization of investigation that infringes First Amendment interests, despite fact that state supreme court upheld investigation).

185. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 316-20 (1979); *Garner v. Louisville*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924).

186. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). And, a fortiori, it is weaker than the slightly less deferential "substantial evidence" test articulated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); see *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

187. *Gegiow v. Uhl*, 239 U.S. 3, 5 (1915) ("no competent evidence whatsoever"); *Thompson v. Louisville*, 362 U.S. 199, 199 (1960) ("any evidence at all"); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 95 (1965) ("no evidence whatsoever"); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) ("so totally devoid of evidentiary support"); *Florida East Coast Ry. v. United States*, 234 U.S. 167, 185 (1915) ("any evidence whatever").

188. A retreat to pre-modern notions of relevancy will not rescue the literal interpretation, either. Wigmore opposed the modern view of relevancy, offering instead a doctrine of "legal relevancy," which required the evidence to have a "plus value" rather than a "minimum of probative value." See 1A J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (Tillers rev. 1983). Wigmore believed that the demand for a "plus value" would not require the judge to "weigh" the evidence in a fashion that would invade the province of the jury. *Id.* at 976. This doctrine served in part the function served today by the rule that concededly relevant evidence can be excluded if it is confusing, prejudicial, or a waste of time. See *id.* at 975; 2 D. LOISELL & C. MUELLER, *FEDERAL EVIDENCE* § 124-28 (1985); J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW*, 516-17 (1898). Wigmore's view has had some currency, particularly before the violent attacks of George James and Charles McCormick in the middle of this century. See C.

we take the Thayer position¹⁸⁹ later codified in the Model Code,¹⁹⁰ Uniform Rules,¹⁹¹ and Federal Rules of Evidence,¹⁹² then any datum is relevant if it tends to increase or decrease in the slightest degree the probability that a fact to be determined is true. Evidence that two inmates were in the same prison as an assault victim is some relevant evidence of their complicity in the assault.¹⁹³ Evidence that an individual has remained in a cafe for half an hour without ordering any food or drink is some relevant evidence that he is loitering.¹⁹⁴ Evidence that a draft registrant is below the age of twenty is some relevant evidence that he is not a minister of religion.¹⁹⁵ And, painful as it is to say, under early twentieth century conditions evidence that an applicant for admission to the United States was of Chinese ancestry was some evidence relevant to a claim that he was not an American citizen.¹⁹⁶

In the due process adjudicative context where the rule has been applied,¹⁹⁷ the literal interpretation would make the rule redundant.

MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 320-21 (1954); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941). But the earliest "some evidence" cases could not be explained historically as relying on the absence of any legally relevant evidence in Wigmore's sense. There is no suggestion in those cases that what little evidence there was should have been inadmissible; rather, it failed to provide a fair basis for the decision.

189. J. THAYER, *supra* note 188, at 264-69, 516-17.

190. MODEL CODE OF EVIDENCE Rule 1(12) (1942) ("evidence having any tendency in reason to prove any material matter").

191. UNIF. R. EVID. 1(2) (1953) (" 'Relevant evidence' means evidence having any tendency in reason to prove any material fact.")

192. FED. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

193. *Cf. supra* text accompanying notes 168-75. (discussion of *Hill*).

194. *Cf. supra* text accompanying notes 122-63 (discussion of *Thompson*); see *Freeman v. Zahradnick*, 429 U.S. 1111, 1114 (1977) (Stewart, J., dissenting from denial of certiorari) ("Indeed, in the *Thompson* case itself, could it fairly have been said that the mere fact that the defendant was found in a cafe, rather than home in bed, was *some* relevant evidence that he was guilty of loitering and disorderly conduct?").

195. *Cf. supra* text accompanying notes 110-16 (discussion of *Dickinson*).

196. *Cf. supra* text accompanying notes 11-49 (discussion of *Tang Tun*). Prior to 1907, the Chinese were the only nation that was categorically excluded from entering the United States; the exclusion was extended to an "Asiatic Barred Zone" in 1917. The general national origins quota system was not adopted until the 1920s. Thus, until that time, Chinese aliens had distinctive incentives to falsify claims of American citizenship, and it is widely acknowledged that many did. See S. TSAI, *CHINESE EXPERIENCE IN AMERICA* 99-101 (1986).

197. *Outside* the context of due process adjudication, one could make some sense (though not much) of a literal "some evidence" requirement as a prohibition against government action based wholly on armchair speculation. For example, legislatures or administrative agencies might be forbidden to adopt rules without enough factual investigation to turn up literally *some* relevant evidence; adjudicative decisions that are immune from procedural due process requirements under the Supreme Court's current entitlement doctrine might still need to be based on literally *some* relevant evidence. These are not, however, the contexts in which the Supreme Court has applied the rule. See, e.g., *Townsend v. Yeomans*, 301 U.S. 441, 451-52 (1937) (legislatures have no obligation to

Once the tribunal is required to hold a hearing and make a record, only the grossest of bureaucratic foul-ups could lead to a record void of even one fragment of relevant evidence. Evidence that the respondent was alive at the time in question is usually relevant to any charge against her. The protection of the "some evidence" requirement demands more than that — less than legal "sufficiency" of evidence, but more than a trivial charade. Once we have determined the purpose of the "some evidence" requirement, it will be possible to state more clearly the content of this intermediate standard.¹⁹⁸

3. *The "Some Evidence" Requirement Is a Standard of Review, not a Requirement that Particular Procedures Be Employed by the Original Decisionmaker*

When a court reviews the decisions of another tribunal or series of tribunals, it is important to distinguish between the procedural requirements applicable to the adjudicative process of the original decisionmaker and the standards of review applied by the reviewing court. Standards of review are not procedures employed by the original decisionmaker in order to increase the accuracy or fairness of the decisions it actually reaches. The decisionmaker is not required to take into account the standard that reviewing courts would apply, and the standard of review should not affect the outcome reached by a totally conscientious decisionmaker, although realism suggests that a less righteous tribunal's decisions may be improved if it is looking over its shoulder at the prospect of review.¹⁹⁹ Standards of review may also further interests in accuracy or fairness by providing a back-up for procedural requirements that are difficult to enforce directly.

The difference may be illustrated by considering the standard for federal habeas corpus review of the sufficiency of the evidence to support a conviction after a bench trial in state court. Under *In re Winship*,²⁰⁰ the judge may only convict the defendant if she is persuaded of his guilt beyond a reasonable doubt. The Supreme Court has held that this requires more than the formality of reciting the

investigate); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935) (strong presumption that facts exist to support an administrative rule); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (where no liberty or property interest involved, due process simply inapplicable).

198. See *infra* p. 678.

199. See, e.g., Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 920 (1975).

200. 397 U.S. 358 (1970).

right standard of proof; for the judge to comply with her constitutional obligations, she must actually apply that standard to the evidence. Of course, such a mental process is difficult to oversee. Nonetheless, the Supreme Court held in *Jackson v. Virginia*²⁰¹ that a federal court sitting in habeas corpus must do more than ascertain that the judge has not openly applied the wrong standard. The court must also determine whether all the evidence in the record, viewed in the light most favorable to the prosecution, would permit a rational finder of fact to find guilt beyond a reasonable doubt. This inquiry is required because if a rational factfinder could not have so found, the federal court should conclude that the judge must somehow have failed to comply with her obligation.²⁰² This is not the same as asking whether the judge subjectively ignored the standard, nor is it the same as asking whether the state provided a judge who was of subnormal intelligence or insane.²⁰³ Those would be procedural defects in the trial, and they might explain how the defendant came to be convicted on insufficient evidence, but such defects could also be present in a case in which the evidence was in fact constitutionally sufficient to permit a conviction. On the other hand, it makes little sense to say that the state is subject to a procedural requirement of putting before the judge enough evidence to permit rational finders of fact to convict beyond a reasonable doubt. The state's procedural obligation at trial is greater: the prosecution must put in enough evidence to persuade *this* judge to convict beyond a reasonable doubt, and she must convict only if the evidence so persuades her.

The "some evidence" requirement is a standard of review, not a procedural requirement applicable to the original tribunal. Like its relative the substantial evidence test, it does not direct the original tribunal to make sure that a certain amount of evidence is put into the record. A tribunal that announces that it has "some evidence" before it and therefore can proceed to deprive an individual of liberty or property is not fulfilling a constitutionally imposed duty. Rather, when a reviewing court characterizes a tribunal's decision that lacks "some evidence" to support it as a due process violation, the court is condemning some vice other than inattention to the "some evidence" rule.

201. 443 U.S. 307, 316-19 (1979).

202. *Id.* at 317-18.

203. *Cf. id.* at 319-20 n.13 ("The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder — if known.").

B. Explaining the "Some Evidence" Requirement

In this section I will examine a number of possible explanations for the "some evidence" requirement, including several suggested or hinted at by court opinions and commentators, and a few that suggest themselves. I do not claim that all of the Court's holdings and dicta relating to the "some evidence" requirement can be forced into a neat pattern; rather, it will be necessary in this inquiry to rely in part on normative considerations and to reject certain suggestions of various justices. I will start by exploring, and rejecting, the interpretation of this requirement as a broad prohibition of substantively arbitrary decisions — in the traditional parlance that has regained currency, a substantive due process account. Then I will briefly discuss a number of procedural due process explanations for demanding "some evidence." Having identified the ones that seem most likely, I will use them in the next Part to articulate an argument elaborating and justifying the "some evidence" requirement.

1. "Some Evidence" as a Substantive Due Process Requirement

Some justices have interpreted the "some evidence" requirement as a guarantee of nonarbitrary government action in the substantive rather than the procedural sense. As Justice Brennan has suggested, "the government has no legitimate interest in punishing those innocent of wrongdoing."²⁰⁴ Punishing an individual without any evidence of guilt would thus be arbitrary conduct violative of substantive due process.²⁰⁵ But substantive due process might well require more than just "any" evidence. Imagine, for example, that a newly appointed state university department head dismisses a professor for cause, giving as her reason the fact that he falsified his birthdate on his application form. If the professor challenges the dismissal, alleging that discharge for an immaterial misrepresentation is arbitrary and violates equal protection and substantive due process, a court would inquire into the rationality of the policy.²⁰⁶ If instead the professor alleges that he gave his correct birthdate, and that the finding

204. *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) (citing *Thompson v. City of Louisville*, 362 U.S. 199 (1960)).

205. See *Boddie v. Connecticut*, 401 U.S. 371, 384 (1971) (Douglas, J., concurring); *Bearden v. Georgia*, 461 U.S. 660, 666 n.7 (1983).

206. Substantive due process review has been applied not only to statutes, but to administrative regulations, e.g., *Kelley v. Johnson*, 425 U.S. 238 (1976) (police hair length rule), and to rules made in the course of adjudication, e.g., *Bearden*, 461 U.S. 660 (revocation of probation due to indigent's failure to pay fine).

to the contrary was a pretext for dismissing him in retaliation for political activities, the court may engage in constitutional fact review to determine the true cause of his dismissal.²⁰⁷ Suppose, however, that the professor alleges only that the department head was grossly mistaken in concluding that he misrepresented his birthdate — a proper reading of his birth certificate demonstrates that he was born on the day he stated. The Supreme Court has indicated that individual blunders of this kind do not raise equal protection issues, even if they are irrational.²⁰⁸ Might such blunders violate a substantive due process right to a substantively nonarbitrary decision?

Justice Black articulated such a view, writing for the Court in *Schwartz v. Board of Bar Examiners*.²⁰⁹ In that case the Court overturned denial of state bar admission to a former Communist on character grounds. Justice Black purported to avoid any First Amendment questions,²¹⁰ applying instead rationality review under the Due Process Clause:

A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.²¹¹

He then engaged in a close review of the reasons given for finding bad moral character, discounting such factors as past use of aliases, arrest records, and past Party membership before finding “no evidence in the record which rationally justifies a finding that Schwartz was morally unfit to practice law.”²¹²

The notion that substantive due process forbids punishing the innocent comes dangerously close to suggesting that state adjudicative decisions must be correct to be constitutional. For the Constitution to prohibit *knowing* conviction of the innocent should be uncontroversial.²¹³ But to condemn as unconstitutional unduly mistaken conclusions, regardless of the fairness or usual accuracy of the procedures by which they were reached, could go much further. The broadest possible application of the constitutional fact doctrine in

207. See *Rankin v. McPherson*, 483 U.S. 378 (1987), *reh'g denied*, 108 S. Ct. 31 (1987). *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

208. *Beck v. Washington*, 369 U.S. 541, 554 (1962); *Snowden v. Hughes*, 321 U.S. 1 (1944).

209. 353 U.S. 232 (1957); see also *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

210. *Schwartz*, 353 U.S. at 243 n.13.

211. *Id.* at 239.

212. *Id.* at 246-47.

213. See, e.g., *Mooney v. Holohan*, 294 U.S. 103 (1935) (due process forbids conviction resting on prosecutor's knowing use of perjured testimony).

light of such a rule would imply de novo review in federal court of every governmental adjudication. This would be "as applied" review of constitutionality with a vengeance.

Actually, the exercise of constitutional fact review might be reserved for cases where government action threatens "fundamental" substantive due process rights or rights protected by other constitutional guarantees.²¹⁴ In other cases, "rational basis" scrutiny under the due process clause would probably require federal court review of the rational sufficiency of the evidence.²¹⁵ The lower federal courts have followed this course in a number of contexts, including the dismissal of faculty.²¹⁶ Thus, our hypothetical professor would probably not prevail in federal court merely by proving that he was born on a particular day, but rather by showing that the evidence before the department head would not support a rational inference that he was not.

To decide whether evidence could rationally support a finding of fact, a court might follow either of two routes. First, it might limit its inquiry to the reasoning process articulated in the factfinder's written opinion or testimony, if available.²¹⁷ Alternatively, it might have to proceed as under the traditional rational basis test for legislation, examining conceivably rational chains of inference between the evidence and the conclusion (or at least those chains identified by counsel), and upholding the finding if any rational chain exists.

The inquiry into the "rationality" of inferences from evidence, just like the inquiry into the "rationality" of rules, is not a detached sci-

214. *But cf.* *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (Court untroubled by jury's de novo factfinding in case involving involuntary confinement). *Schwartz* seems best explained as an application of the constitutional fact doctrine to a case with first amendment and substantive due process dimensions.

215. *But see, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) (academic decisions entitled to particular deference, and therefore reviewable only for "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment").

216. *See, e.g., Viverette v. Lurleen B. Wallace State Junior College*, 587 F.2d 191 (5th Cir. 1979) (substantial evidence review of dismissal of dean); *Holley v. Seminole County School Dist.*, 755 F.2d 1492 (11th Cir. 1985) (substantial evidence review of teacher's dismissal); *Lew v. Kona Hospital*, 754 F.2d 1420 (9th Cir. 1985) (substantial evidence review of termination of physician's staff privileges at state hospital); *Yashon v. Hunt*, 825 F.2d 1016 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2015 (1988) (same); *cf. Jackson v. Hayakawa*, 761 F.2d 525 (9th Cir. 1985) (substantial evidence review of student disciplinary proceeding, apparently as matter of *procedural* due process).

217. *Cf. Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) (state decision reviewed for arbitrariness on basis of "facts and logic" identified by decisionmaker); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970) (same).

entific endeavor designed solely to weed out the non sequiturs of deranged public officers.²¹⁸ It is commonly recognized today that rationality review of legislation is not a value-neutral means scrutiny, but rather depends crucially on normative assumptions.²¹⁹ Thayer pointed out almost a century ago that efforts to keep legislatures and juries within the bounds of "rationality" presuppose a judicial ideal of a conscientious, public-regarding body.²²⁰ Factual inferences can be rejected as irrational only through a normative process that discounts connections based on world views that the reviewing court finds incompatible with overriding values.²²¹ Where the inferences relate to physical processes, those values may involve faith in modern scientific methodologies or particular scientific subcommunities. Where the inferences relate to individual or social conduct, the values address conceptions of human nature, the legitimacy of stereotypes, appraisals of moral worth, or faith in statistical or other social-scientific methodologies. Thus, the choice among such methods of deducing a professor's true birthdate as examining his birth certificate, observing the day he receives presents and congratulations from his friends, and deciding whether he acts like a Taurus, will depend on scientific, cultural, and moral assumptions. This normative process operated openly in *Schwartz*, where the nature of the issue channeled Justice Black's analysis of the "evidence" into denying the moral relevance of the petitioner's willingness to work under an alias,²²² his record of arrests,²²³ and the circumstances of his join-

218. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935).

219. See, e.g., Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1059-61 (1980); Linde, *Due Process of Law-making*, 55 NEB. L. REV. 197, 208 (1976).

220. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893) ("And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body; and the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent — but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs, — what such persons may reasonably think or do, what is the permissible view for them.").

221. See R. UNGER, *KNOWLEDGE AND POLITICS* 32-34 (1975); J. WIGMORE, *supra* note 188, at 1023-24 n.6; Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 411-12 (1985); Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 708-10 (1978); cf. C. MCCORMICK, *supra* note 188, at 319 ("The answer must filter through the judge's experience, his judgment and his knowledge of human conduct and motivation.").

222. 353 U.S. at 240-41 (examining innocent justifications for use of alias); cf. Mansfield, *supra* note 221, at 416-17 (criticizing Michigan case where court held it error to permit impeachment of defendant's credibility based on his use of aliases).

223. 353 U.S. at 241 n.6 (citing Wigmore for impropriety of deducing misconduct from arrest); *id.* at 242 (deprecating significance of possible violation of Neutrality Act by recruiting volunteers for Spanish Loyalists).

ing and leaving the Communist Party.²²⁴ But the same process is clearly at work in such ostensibly factual inquiries as Justice Harlan's analysis in *Leary v. United States*²²⁵ of the likelihood that users of marijuana would know that the substance they possessed was imported.

In either case, a substantive due process approach modeled on *Schwartz* would seem to demand an acceptably reasoned basis (or more) for every adjudicative decision, not merely the adoption of methods and procedures for adjudication that are fair and reasonably accurate. I am not prepared to say that this would necessarily be a bad thing. It would, however, be extraordinarily ambitious. It would do throughout the legal system what *Jackson v. Virginia* has done in the criminal law — require independent scrutiny of the record to make sure that a "rational" decisionmaker could have reached the challenged decision on the evidence presented, in light of the apparently applicable substantive law and the legal burden of proof.²²⁶ This project would involve the federal courts in assuring the acceptability of the evidentiary inferences needed to support essential findings of fact. It could also require the federal courts to police more closely the reasonableness of interpretations of state law by inferior state tribunals. For example, it is often difficult to distinguish an "unreasonable" finding of "ultimate" fact from a misinterpretation of the legal standard that frames the factual question. It would call into question the frequent statements by the Supreme Court that merely erroneous departures from state substantive law or procedure by state officials do not ordinarily raise federal constitutional questions.²²⁷ Moreover, as a substantive due process approach, it should

224. *Id.* at 246 (not all Communist Party members in the Thirties shared its "evil purposes").

225. 395 U.S. 6, 47-48 (1969) ("It should also be kept in mind that the great preponderance of marihuana smokers are 'occasional' rather than 'regular' users of the drug, and that 'occasional' smokers appear to be arrested disproportionately often, due to their inexperience in taking precautions. 'Occasional' users are likely to be less informed and less particular about the drug they smoke; hence it is less probable that they will have learned its source in any of the above ways."); compare *Turner v. United States*, 396 U.S. 398, 416-17 (1970) (citation omitted) ("Turner and others who sell or distribute heroin are in a class apart . . . 'Common sense' tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled.").

226. It would not, however, authorize federal district courts to review factual findings made in state judicial proceedings, unless these resulted in a deprivation of physical liberty cognizable on habeas corpus. Rather, federal scrutiny would be in the Supreme Court on direct review. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

227. *E.g.*, *Engle v. Isaac*, 456 U.S. 107, 121 (1982); *Beck v. Washington*, 369 U.S.

be more broadly applicable than procedural due process requirements. Substantive due process, like equal protection, restricts government action even when the government is not depriving an individual of an identifiable "entitlement."²²⁸

More to the present point, this doctrine would go beyond the limitations traditionally ascribed to "some evidence" review. Although different Justices have taken different positions, and although many of the decisions are fatally ambiguous, the Supreme Court has often insisted that the "some evidence" standard requires much less than "sufficient" evidence. The Court has specifically rejected broader review in a variety of contexts.²²⁹ Thus, the scope of "some evidence" review does not correspond to what one would expect from a substantive due process approach. It is true that the narrower "some evidence" review will lead to reversal of some of the decisions that would also be condemned by a more intrusive substantive due process inquiry. But this contribution to substantive due process goals is incidental to the more likely functions of "some evidence" review. As I hope to show, the "some evidence" standard makes sense as a procedural due process doctrine relating to issues narrower than total substantive rationality. It is therefore worthwhile to preserve a role for "some evidence" review until the Court sees fit to impose a universal requirement of rational adjudication.

2. "Some Evidence" as a Procedural Due Process Requirement

If we do not ground the "some evidence" requirement on a substantive due process command that adjudicative decisions be rational, or reasonable, or correct, then it is appropriate to ask whether the requirement instead addresses some element of fair and accurate adjudicative procedures. I will consider here a number of respects in which "some evidence" implicates the fairness of procedures. Since I have insisted that the "some evidence" rule is not itself a procedural requirement, but rather a standard of review, it should be helpful to investigate its procedural function by asking: "How could it happen that a decisionmaker reaches a conclusion without 'some evidence' to support it?"

541, 554-55 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948).

228. See, e.g., *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973); but see *Regents of University of Michigan v. Ewing*, 474 U.S. at 223 n.9 (dictum) (suggesting that *Roth* entitlement requirement might also apply to substantive due process claims).

229. See, e.g., *Estep*, 327 U.S. at 114; *Hill*, 472 U.S. at 445; *Thompson*, 362 U.S. at 199.

a. "Some Evidence" and Predisposition

One disturbing possibility is that the decision was made in disregard of the evidence, because the decisionmaker was predisposed to rule against the losing party. In the contexts we are considering, if not always,²³⁰ due process forbids decisions based on predisposition rather than on fair-minded evaluation of the merits. The origins of the "some evidence" requirement demonstrate a concern with precisely this issue — the fairness of immigration hearings was undermined by subjective hostility toward the Chinese, or a conviction as to their general guilt and dishonesty.²³¹ The Selective Service cases raised similar concerns relating to Jehovah's Witnesses.²³² Read against the unusual allegations of the petitioner's brief, *Thompson v. Louisville* might also be explained in terms of predisposition.²³³

The earliest test for "some evidence," articulated in *Tang Tun*, also supports this interpretation. Justice Hughes framed the inquiry as whether "the evidence for the applicants was of such an indisputable character that their rejection *argues the denial of the fair hearing and consideration of their case* to which they were entitled."²³⁴ In short, the case for a connection between "some evidence" and predisposition is so strong that I will say no more on the point here, and will save further discussion until it comes time to justify "some evidence" review.²³⁵

b. "Some Evidence" and Reliance on Non-Record Evidence

An open-minded decisionmaker could also reach a conclusion without "some evidence" in the record to support it by looking open-mindedly beyond the record to other persuasive evidence. In the class of cases under discussion, this would itself be a due process violation. Due process requires in many (though not all) contexts that factfind-

230. See *supra* text accompanying notes 7-8; but see *Arnett v. Kennedy*, 416 U.S. 134, (1974) (Powell, J., concurring) (when supervisor is biased, impartial decisionmaker unnecessary for initial termination of government employee).

231. See *supra* notes 20-27 and accompanying text.

232. See *supra* notes 94-102 and accompanying text.

233. See *supra* notes 131-135 and accompanying text (desire to shield arresting officer from liability; absolute predisposition against innocence of defendants with prior arrest records). But this is not necessarily the actual explanation for the *Thompson* holding.

234. *Tang Tun v. Edsell*, 223 U.S. 673, 681 (1912) (emphasis added). The district court had viewed the immigration inspector's treatment of the evidence as "a glaring manifestation of prejudice." *In re Tang Tun*, 161 F. 618, 622 (W.D. Wash. 1908), *rev'd*, 168 F. 488 (9th Cir. 1909), *aff'd*, 223 U.S. 673 (1912).

235. See *infra* part IV.

ing in adjudicative decisions be based on a record produced before the decisionmaker and disclosed to the individual whose rights are at stake.²³⁶ The decisionmaker may take into account "known" facts not proven in the record by employing judicial notice or its administrative equivalent "official notice," but normally must disclose the facts noticed and afford the individual an opportunity to controvert them.²³⁷ Where a decisionmaker expressly and prejudicially relies upon non-record evidence, a federal court may invalidate the decision for its violation of the due process "on the record" requirement,²³⁸ and there is no need to invoke the "some evidence" rule.

On the other hand, a decisionmaker might rely on non-record evidence to supplement an insufficient record, without disclosing that she had done so. It is probably useful to identify three possible explanations for the failure to disclose: the nondisclosure may amount to deliberate concealment of an irregularity; it may result from the absence of any obligation to identify the evidence on which the findings are based in the decisionmaker's statement of reasons; or the nondisclosure could even be unintentional because the reliance itself was unintended.²³⁹ Cases of unintentional reliance on non-record evidence really shade into cases of predisposition. For example, the fairness of a criminal trial may be undermined by a juror's awareness of press reportage of the trial, or by an ineffective admonition to disregard evidence that cannot lawfully be admitted, such as a codefendant's confession.²⁴⁰ Such impairments differ from actual "predisposition" (such as that arising from pre-trial publicity) only in that the extraneous influence making it impossible for the decisionmaker to limit her attention to the record arises during or after the hearing, and not before.

In instances where the influence of non-record evidence was especially crucial, the result may be a finding without "some evidence" in the record to support it. If one fears that enforcement of an "on the record" requirement will be undercut by decisionmakers' failure to mention their use of non-record evidence, then one might backstop the "on the record" rule with a search for decisions in which likely

236. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); but see, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 565, 567-69 (1974) (permitting nondisclosure of evidence to prisoner to protect witness); *Goss v. Lopez*, 419 U.S. 565 (1975) (permitting greater informality in school discipline); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (permitting greater informality in academic decisions).

237. See, e.g., 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.12.

238. See *id.*; see also *Ohio Bell Tel. Co. v. Public Utils. Comm'n.*, 301 U.S. 292 (1937).

239. The first and third alternatives are mutually exclusive, but the second, absence of a disclosure requirement, may cut across the other two.

240. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Cruz v. New York*, 481 U.S. 186 (1987); Needless to say, similar imperfections may beset a civil trial or an administrative determination.

reliance on non-record evidence is signaled by an obvious gap in the evidence.

A few Supreme Court opinions do contain suggestions that the "some evidence" requirement may serve to weed out such cases. This view could explain the logic of Justice Black's statement in *Thompson v. Louisville* that "[j]ust as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."²⁴¹ The link was more clearly drawn in *Garner v. Louisiana*, where the Court rejected the state's belated reliance on judicial notice to support a finding that sit-in demonstrators would foreseeably "disturb or alarm the public."²⁴²

Thus, redressing otherwise undetectable violations of an "on the record" requirement may be an additional function of the "some evidence" rule. Whether the decisionmaker employs the forbidden evidence knowingly or unknowingly, the individual has been denied the fair hearing on the record that due process requires; indeed, even if the reliance was unintentional, the lack of support in the record is so glaring that the decisionmaker ought to have seen that extraneous factors were influencing her decision.

It is unlikely, however, that detecting departures from an "on the record" requirement is the main purpose of the "some evidence" rule. *Garner* was the rare case in which the reviewing court could identify non-record "evidence" that the court below might truly have employed, and in which justices as diverse in viewpoint as John Marshall Harlan and William O. Douglas could agree that such reliance would have been justified.²⁴³ More commonly, the non-record factors apparently influencing decisionmakers in "some evidence" cases have been illegitimate ones, such as hostility to the Chinese or the Jehovah's Witnesses. In *Thompson v. Louisville* itself, despite the comment of Justice Black just quoted, there was no suggestion of non-record evidence that might have supported the conviction had it been disclosed.²⁴⁴ Moreover, to the extent that an auxiliary rule is necessari-

241. *Thompson*, 362 U.S. at 206 (footnotes omitted).

242. *Garner*, 368 U.S. 157, 173 (1961); see *id.* at 175 (Frankfurter, J., concurring in the judgment); but see *id.* at 193-96 (Harlan, J., concurring in the judgment).

243. See *id.* 176-77 (Douglas, J., concurring); *id.* at 193 (Harlan, J., concurring in the judgment).

244. The trial judge did purport to take judicial notice of Thompson's taste for alcohol, Transcript of Record at 18, but Thompson himself testified that he had bought a beer, *Thompson*, 362 U.S. at 201, and in either case it would not be permissible to deduce loitering or disorderly conduct from a general fondness for strong drink.

tated by the absence of a due process requirement that the decisionmaker disclose the evidence on which she relied in making her factual findings, subjecting the decision to judicial review for "some evidence" in the record appears an unduly costly response, given the alternative of imposing a fuller disclosure requirement. And it is hard to imagine courts agreeing that deliberate circumvention of a due process "on the record" requirement occurs frequently enough to justify a rule designed to prevent it.

c. *"Some Evidence" and a Hearing Without Listening*

Though open-minded, a decisionmaker still might reach a conclusion unsupported by evidence if she paid unconscionably little attention to the record. The due process right to a hearing entails not only the right to speak but also the right to be heard, to be listened to. "[T]o give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."²⁴⁵

Any adjudicator could violate this obligation, although departures may be more predictable when an understaffed agency is obliged to deal out mass justice. The brief in *Thompson v. Louisville*²⁴⁶ made such allegations about the Louisville Police Court, at least in the alternative, suggesting that the judge had learned to handle his caseload by accepting police officers' conclusory accusations against defendants with arrest records. Another scenario in which such charges might be plausible derives from the recent claims against the Veterans' Administration disability processing system, which was alleged to provide its adjudicators with financial incentives that rewarded hasty case-closing.²⁴⁷

d. *"Some Evidence" and the Grossly Stupid Decisionmaker*

Though open-minded and attentive, a decisionmaker still might make findings without "some evidence" to support them as a result of intellectual incompetence. At some point the decisionmaker's disability could well implicate due process concerns; for example, it would raise serious constitutional questions if the state permitted a young child, or even an experienced judge incapacitated by illness, to

245. *Morgan v. United States*, 298 U.S. 468, 481-82 (1936).

246. See *supra* text accompanying notes 133-35. One might characterize this as a claim of bias against persons who had been previously arrested, but that would miss the flavor of the discussion, which suggests the adoption of a wholly arbitrary principle to expedite disposition of cases.

247. See *infra* note 304; cf. Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772, 798 (1974) (discussing bureaucratic incentives for "speedy but otherwise poor quality adjudications").

conduct a bench trial.²⁴⁸ More likely, however, the honest but "incompetent" decision will reflect the effort of a person of average intelligence to grapple with issues that the reviewing judge claims to understand better, as a result of his greater intelligence or his superior education.

The Supreme Court has thus far refused to set intellectual qualifications for adjudicators as a matter of constitutional law. It has repeatedly held that administrative decisionmakers need not be lawyers,²⁴⁹ and even repulsed a vigorous campaign to require legal training for all criminal trial judges.²⁵⁰ In a few cases, the Court has treated the application of "professional" expertise as a reason for accepting relaxed procedural standards, but without authorizing an inquiry into the actual level of professional competence the decisionmaker possesses.²⁵¹ One court of appeals has adopted the argument that due process precludes trial by jury in certain cases that are too complex for jurors to understand,²⁵² but others have balked at this suggestion, partly because the sixth and seventh amendments express a political faith in decisionmaking by "ordinary" jurors,²⁵³ and partly because recognizing that cases can be too difficult for jurors suggests that they might also be considered too difficult for judges.²⁵⁴ Technically unlearned trial judges routinely make factual

248. Cf. *Jordan v. Massachusetts*, 225 U.S. 167 (1912) (sanity of juror).

249. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole board); *Schweiker v. McClure*, 456 U.S. 188, 199 n.14 (1982) (Medicare claims processing).

250. See *North v. Russell*, 427 U.S. 328 (1976) (upholding initial trial before lay judge in "two-tier" system allowing de novo appeal); *id.* at 340 n. 2 (Stewart, J., dissenting); Note, *Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings*, 61 VA. L. REV. 1454 (1975); Note, *The Right to a Legally Trained Judge*: *Gordon v. Justice Court*, 10 HARV. C.R.-C.L. L. REV. 739 (1975).

251. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 606-18 (1979); *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978); but see *Schweiker v. McClure*, 456 U.S. 188, 199-200 (1982) (discussing approvingly resumes of hearing officers). In contrast, the Court has authorized lower courts to police adherence to accepted professional standards of care in substantive due process cases. See *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

252. *In re Japanese Electronic Prods. Antitrust Litigation*, 631 F.2d 1069, 1084 (3d Cir. 1980). See Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978).

253. E.g., *In re Japanese Electronic Prods. Antitrust Litigation*, 631 F.2d at 1093 (Gibbons, J., dissenting); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58-60 (1977).

254. E.g., *SRI Int'l. v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1128-29 (Fed. Cir. 1985) (additional views of Markey, C.J.); *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 431 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980); Higginbotham, *supra* note 253, at 53-54; Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 90-95 (1981).

findings turning on principles of antitrust economics or statistics that they do not fully comprehend.²⁵⁵ And in reviewing administrative action, particularly in the area of environment and health, courts decide cases that they openly acknowledge as technically beyond their competence.²⁵⁶

The absence of constitutionally required meritocratic qualifications for decisionmakers is consistent with a view of due process as setting standards of fair adjudication within a system of self-government. Due process defines the procedures that fallible, human citizens must employ when they bring sovereign power to bear on the case of a fellow citizen. While an exclusive emphasis on "accuracy" in decisionmaking might drive us toward limiting all adjudicative authority to an elite of experts or a well-programmed computer,²⁵⁷ such a trend would be foreign to a perspective on due process that stressed its contribution to the relationship between individuals and their government.

Whatever the reason may be,²⁵⁸ the Supreme Court has resisted subjecting the intellectual capacity of the decisionmaker to constitutional investigation. It is difficult to believe that the "some evidence" standard is designed as a roundabout way of insuring compliance with a norm that the Court has refused to articulate. Nor do any of the Court's "some evidence" opinions themselves suggest a fear that insufficient mental equipment lay behind the decision being challenged.

255. See Lempert, *supra* note 254, at 91; Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 9 (1980). See generally Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

256. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 36-37 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976); *Ethyl*, 541 F.2d at 66-67 (Bazelon, C.J., and McGowan, J., concurring); *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981). See also Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 LAW & CONTEMP. PROBS. 225, 228-30 (1987). Courts occasionally feign ignorance when declining to review decisions with foreign policy dimensions, but they relate their incapacity to separation of powers, not due process, concerns. See *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964).

257. Cf. *Atkins v. Parker*, 472 U.S. 115, 130 (1985) (computerized recalculation of food stamp benefits plus notice of opportunity to appeal "inadvertent errors" satisfies due process); 5 U.S.C. § 554(a)(3) (1982) (decisions resting on inspections, tests, or elections excluded from formal hearing requirements).

258. I recognize that the "balancing approach" of *Mathews v. Eldridge*, 424 U.S. 319 (1976), is sufficiently flexible to let the individual's interest in the precision of the decisionmaking procedure be outweighed by the government's interest (whether political or just financial) in increasing the pool of potential decisionmakers.

e. *"Some Evidence," Presumptions, and Rational Decisionmaking Processes*

Before leaving this subject, I should point out that a few Justices have linked the "some evidence" requirement with procedural due process limitations on the use of presumptions. Roughly at the same time when the constitutional "some evidence" rule emerged, the Supreme Court held that evidentiary presumptions violated due process if they were not rationally based in experience.²⁵⁹ Justices Black and Douglas have described this doctrine as preventing legislators from authorizing the conviction of defendants when there is no evidence of guilt.²⁶⁰ Their point might be more accurately put by characterizing the doctrine as ensuring the rational sufficiency of the evidence, a stricter goal than that of the "some evidence" requirement. The parallel between irrational presumptions and "no evidence" fails in other respects as well. A presumption is a procedural device, employed by the factfinder at trial, which poses a danger of undermining the accuracy of the decisionmaking process.²⁶¹ The "some evidence" requirement, in contrast, is only a standard of review, and imposes no limitations on the procedure at trial.²⁶²

The lack of connection between presumptions and "some evidence" becomes even more apparent if one accepts (though I do not) certain modern criticisms of the now-traditional presumption analysis. Critics have insisted that presumptions should be viewed in substantive rather than procedural terms; by shifting burdens of proof, they realign the elements of criminal offenses or civil causes of action in a way that is normally permissible.²⁶³ Moreover, given the

259. *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916). For a while, this analysis competed with other approaches to presumptions, but the Court firmly settled on the "rational connection" test in *Tot v. United States*, 319 U.S. 463 (1943).

260. *Tot v. United States*, 319 U.S. 463, 473 (1943) (Black & Douglas, JJ., concurring); *Turner v. United States*, 396 U.S. 398, 429 (1970) (Black & Douglas, JJ., dissenting); *Leary v. United States*, 395 U.S. 6, 55 (1969); *Barnes v. United States*, 412 U.S. 837, 851 (1973) (Douglas, J., dissenting); cf. *Thompson v. City of Louisville*, 362 U.S. 199, 206 n.13 (1960) (Black, J., citing his *Tot* concurrence).

261. See, e.g., Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1582-83 (1981); Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 180-82 (1969).

262. See *supra* text accompanying notes 199-203.

263. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1336-37, 1387-93 (1979); Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 339-45 (1980). These commentators have argued that

character of presumptions as openly articulated and generally applicable rules, they raise less concern about tribunals' denying a meaningful hearing to particular individuals or classes.

Nevertheless, one older theme in the analysis of presumptions may relate to the concerns underlying the "some evidence" requirement. Early cases discussing the rebuttability of presumptions²⁶⁴ emphasize that a presumption must not "shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue."²⁶⁵ To the extent that this requirement rests on the right of the individual to be heard by the government on the merits of question ostensibly at issue between them, it does serve a function also served by the "some evidence" requirement.²⁶⁶

* * *

In summary, a group of related explanations for the "some evidence" requirement seem most persuasive: the requirement is procedural, and protects the individual's right to an impartial and conscientious decision on the merits, based on the evidence of record. It then becomes possible to venture a formulation more specific than the phrase "some evidence" itself. *A decision is not supported by "some evidence" when the discrepancy between the findings on which it rests and the evidence of record is so great as to indicate clearly that the findings were not in fact derived impartially from the record.* This description does not define "some evidence" as a quantum of evidence, but rather defines it functionally in terms of the requirement's purpose, just as the "definition" of "substantial evidence" as evidence that would satisfy a reasonable factfinder does. Requiring "some evidence" guards against hearings that are not truly meaningful because the decisionmaker vitiates the individual's opportunity for input; this may result from predisposition, utter inattention, or reliance on evidence that the individual is given no opportunity to address. Among these grounds, as will appear later, the danger of otherwise undetected bias provides the strongest justification for the "some evidence" rule, just as it has played the most active role in the rule's history.

any constitutional limits on presumptions should be derived from substantive constraints on the legislature's ability to punish particular kinds of conduct. This view was first espoused by Justice Holmes, the apostle of the gospel that the greater includes the lesser. See *Ferry v. Ramsey*, 277 U.S. 88, 94 (1928).

264. Since the early cases involve a variety of different kinds of presumptions, not necessarily of the "bursting bubble" variety, inquiry into the operation of the challenged presumption was important. See, e.g., *Western & A. R.R. v. Henderson*, 279 U.S. 639, 642 (1929) ("presumption to be considered and weighed as evidence").

265. *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

266. See *supra* text accompanying notes 245-46.

IV. JUSTIFYING "SOME EVIDENCE" REVIEW

Goneril: What need you five-and-twenty, ten, or five,
To follow in a house where twice so many
Have a command to tend you?

— King Lear, Act II, scene iv

Having arrived at a better understanding and more precise formulation of "some evidence" review, I would like now to provide an affirmative justification for its continuation as a constitutional due process requirement. In Part IV(A), I will base my arguments for "some evidence" review on the due process methodology that I find most persuasive, a traditional qualitative due process methodology that emphasizes the importance of an opportunity for individuals affected by a government decision to participate in the decisionmaking process. I will not purport to demonstrate, however, that the "some evidence" doctrine *necessarily* requires a participatory account of due process. Due process approaches centered on "accuracy" concerns would also support wide application of "some evidence" review, as I hope will appear from Part IV(B), where I examine "some evidence" review in the context of a quantitative, cost-benefit approach to due process. Readers who share my preference for the type of analysis pursued in Part IV(A) are invited to skip over Part IV(B) thereafter, but readers who prefer cost-benefit analysis will still need some considerations developed in Part IV(A).

A. *Adjudicative Integrity*

When should a court treat a decision without "some evidence" as transgressing constitutional norms? Let me begin by appropriating for my own uses Lon Fuller's well-known evocation of the adjudicative ideal:

This whole analysis will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced.²⁶⁷

Without meaning to adopt all of Fuller's assumptions and conclu-

267. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (K. Winston ed. 1978).

sions, I will share his emphasis on the *integrity* of an adjudication, in the sense of preservation of the meaningfulness of the affected party's right to participate.

Some forms of collective decisionmaking affect all of society roughly equally. In these cases, equal respect for the liberty of persons can be served by participation through representation and the presumed openness of the political process.²⁶⁸ Adjudication, however, concentrates its force so greatly on the fate of an individual that more is required. The symmetry between the individual as one of many members of a self-governing society and the decisionmaker as representative of that society breaks down when the decision addresses itself to the affairs of one person in particular.²⁶⁹ Affording the individual an opportunity for direct participation in the decision responds to that asymmetry. *First*, it provides some assurances of *accuracy* in the decision — that is, assurances that the individual's interests will be disposed of in accordance with the generally applicable collective decisions in which she has indirectly participated.²⁷⁰ Though in many cases the targeted individual will have knowledge peculiarly relevant to the decision, this is not necessarily true, and the individual's relevant inputs may rely entirely on the knowledge of others. Thus, identifying the targeted individual as the only private party with the right of participation serves accuracy generally, on the average. A *second* factor is at least as important: that permitting direct participation expresses *respect* for the moral standing of the individual. Revealing the opposing evidence and giving the individual a chance to respond not only improves the accuracy of the decision, but also gives the individual a privileged role in the deliberative process the outcome of which uniquely concerns her. The terminology used for discussing such matters varies greatly from author to author; I will follow Jerry Mashaw in employing the adjective "dignitary" to indicate due process conceptions admitting factors other

268. Of course, a major theme in modern administrative law has been the expansion of opportunities for direct participation in rulemaking proceedings to make up for the remoteness of delegated lawmaking from the democratic political process. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). See also Fed. R. Civ. P. 83 (notice and comment rulemaking by district courts).

269. In May's theorem on the choice-theoretic characterization of majority rule, the symmetric treatment of all members of society in terms of their input into a decision-making process is known as "anonymity." A more "libertarian" perspective suggests that anonymity would be undesirable in the process employed for making certain narrowly focused decisions. See, e.g., D. MUELLER, PUBLIC CHOICE 208-10 (1979). This insight is reflected in, for example, the bill of attainder clauses, U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

270. See Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVII (Due Process) 126, 129-33 (1977) (discussing linkage between positivism, Roth entitlement doctrine, and concern for accurate decisionmaking).

than accuracy.²⁷¹

My theme in this article is factfinding. Of course, "fact" is merely one pole of a spectrum, just like "adjudication." But in the pragmatic judicial vernacular, "factfinding" lends itself well to talk of correctness, and accuracy justifications easily dominate discussions of factfinding procedures. The Supreme Court's recent procedural due process jurisprudence, to the consternation of many observers,²⁷² has focused almost exclusively on accuracy of factfinding. Dignitary factors, however, surface in the corners. For example, although the Court's entitlement doctrine denies the applicability of procedural due process to wholly discretionary decisions, the Court has held, with serendipitous inconsistency, that where hearings are already necessary the individual must also be afforded a right to address discretionary aspects of the decision.²⁷³ The implications of adjudicative factfinding are concentrated particularly on the individual.²⁷⁴ Adjudication may also serve functions relating to the adoption of rules or norms with a *prima facie* claim to govern future cases between other parties, a matter in which everyone shares an interest;²⁷⁵ the individual has somewhat diminished rights in addressing such matters, because of the greater social interest in their optimal resolution.²⁷⁶ But an individual has an overwhelming interest in the finding of facts

271. See Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 886 (1981). It is necessary to be explicit about this, since other authors identify "dignity" as a *particular* example of a governing value in what Mashaw would term a "dignitary theory." E.g., Summers, *Evaluating and Improving Legal Processes — A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 23 (1974).

272. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-13 (1978); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 CHI. L. REV. 28, 38 (1976); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 117-19 (1978).

273. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

274. But see *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) (denying nursing home patients due process rights in hearings leading to decertification of nursing home); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (victim of crime has no standing to challenge prosecutor's nonenforcement).

275. Some decisionmaking systems, however, ascribe no precedential significance to certain adjudicative decisions. See, e.g., Mashaw, *supra* note 247, at 786-87; Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1316-17 (1972) (discussing nonprecedent decisions in immigration law).

276. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948) (lower standard of impartiality required for policy determinations in adjudication); *accord Hortonville Joint School Dist. v. Hortonville Educ. Ass'n.*, 426 U.S. 482, 495-96 (1976); 2 K. DAVIS, *supra* note 82, § 15.05 (justifying agency's independent development of issues of "legislative fact"); but see *Fuller*, *supra* note 267, at 388 (insisting that decision of a case on grounds not discussed at the hearing renders the adjudicative process a sham).

about her as a prelude to government action *against* her.

Both for reasons of accuracy and for dignitary reasons, the individual's opportunity to participate in the factfinding process must be meaningful. The decisionmaker must give respectful consideration to the evidence the individual supplies or elicits, and preservation of the individual's right to respond requires that the findings be based only on evidence that she has been given a chance to rebut. Denying consideration of her evidence or relegating the hearing to a "sideshow" undermines the integrity of the adjudicative process and vitiates her right to participation. These imperatives are reflected in the widespread due process requirements of impartiality, disclosure of opposing evidence, and a decision based on the evidence of record.

Some of the vices that impair adjudicative integrity also directly attack the dignity of the individual, and may violate substantive constitutional commands; others do not. For example, decisions infected by racial prejudice are inherently degrading, and transgress fundamental equal protection norms as well as procedural due process norms of meaningful participation. Religious affiliation has too commonly been a ground of prejudice, and decisions resting on religious animosities implicate the free exercise and equal protection clauses as well as the due process clause. Our nation has also witnessed its share of political trials, which raise concerns about freedom of speech and association as well as about procedural due process. Sometimes, however, lack of impartiality does not depend on particular characteristics of the individual. A decisionmaker's unshakeable conviction that *all* defendants are guilty, or the bias induced by pretrial publicity, would infringe due process norms without raising independent constitutional problems. Similarly, a rush to judgment without conscientious attention to the record may reflect a tribunal's caseload pressures rather than specific disrespect directed to the victim of the injustice.

All of these vices and their correlative virtues are matters of degree. Human beings make decisions, and human beings rarely attain perfection. A judge's mind sometimes strays a little, and she may unconsciously find a mite more credible a witness who shares her regional accent, ethnic background, class, or gender. Justice is a goal that decisionmakers must strive to achieve, recognizing and restraining impulses that could be tolerated in private life. "Fairness" in decisionmaking includes a range of reasonably fair decisions, slightly tinged by predispositions that decisionmakers resist, but that may sway very close cases, and by small lapses in concentration that may lead them to overlook some subtleties of argument. Yet within these human limitations, the requirements of impartiality and attentiveness are fundamental.

Enforcing these due process requirements is not as easy as stating

their importance. I will briefly review some of the norms commonly employed to police the impartiality of judicial and administrative decisionmaking. The many gaps and limitations in these rules illustrate the need for the additional protection that the "some evidence" requirement affords.

Bias is highly corrosive but very difficult to detect; as a result, courts speak of due process requirements of "impartiality" in two different senses. Some cases turn on findings of *actual* bias as a subjective state of mind in the decisionmaker.²⁷⁷ More often, rules regarding impartiality identify fact patterns that create an *ex ante* likelihood of significant bias.²⁷⁸ The common law developed strict rules of disqualification for pecuniary interest under the maxim that one should not be the judge in one's own case.²⁷⁹ These rules were intended as a broad safeguard against bias, though it was recognized that many decisionmakers could judge fairly in cases where they had an interest.²⁸⁰ The Supreme Court made the same observation when it held that due process forbade criminal convictions by judges who received a portion of the fine: undoubtedly judges "of the highest honor and self-sacrifice could carry it on without danger of injustice," but the procedure "would offer a possible temptation to the average man . . . not to hold the balance nice, clear and true between the State and the accused."²⁸¹ Similarly, the Court speaks of "impartiality" when meaning merely that decisionmakers should not take part in review of their own decisions.²⁸² The Court's faith that decisionmakers can sufficiently overcome biasing factors reasserts itself when *ex ante* rules of impartiality must yield to what is called the "rule of necessity." Those who would otherwise be disqualified may be permitted to conduct the adjudication if the ground of dis-

277. See, e.g., *Johnson v. Mississippi*, 403 U.S. 212 (1971); cf. *Offutt v. United States*, 348 U.S. 11 (1954) (finding bias in case decided under supervisory power); but see *Arnett v. Kennedy*, 416 U.S. 134, 170 n.5 (Powell, J. concurring) (1974) (apparently approving initial termination decision by biased supervisor).

278. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

279. See H. WADE, *ADMINISTRATIVE LAW* 421 (5th ed. 1982); *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652, 8 Co. Rep. 113b, 118a (K.B. 1610).

280. *Dimes v. Grand Junction Canal*, 3 H.L.C. 759, 793 (1852); *Sergeant v. Dale*, 2 Q.B.D. 558, 567 (1877).

281. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

282. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972); but see *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (memorandum of *Rehnquist, J.*) (citing Justice Holmes' violations of this rule as "weighty authority"). Note, however, that decisionmakers are not presumed so tied to their *preliminary* determinations that they should refrain from making final decisions later. *Withrow v. Larkin*, 421 U.S. 35, 55-59 (1975).

qualification extends to all the legally authorized adjudicators.²⁸³ Necessity in these matters is relative, for while the presumption of integrity usually prevails, sometimes the Court concludes that due process forbids the tribunal as constituted to proceed.²⁸⁴ In either case, the doctrine of necessity does not trump the underlying due process requirement of *actual* impartiality — the presumption of integrity emphasizes the decisionmaker's continuing obligation to judge impartially.²⁸⁵

The Court has often invoked necessity (or expediency) as a reason for failing to extend *ex ante* rules of impartiality to administrative decisionmakers. This practice illuminates the Court's mixed reaction to the well-worn issue of administrative law known as "separation of functions." The reformist impulse that led to the federal APA included a heavy emphasis on insulating officials with adjudicative responsibilities from those with investigative or prosecutorial responsibilities. Adherents of this approach feared that *ex parte* exposure to evidence in the pre-adjudicative phase of the administrative process would lead an official with combined duties to prejudge adjudicative facts, and that the experience of actively advocating the government's position would psychologically disable the official from fairly assessing the presentations of private respondents.²⁸⁶ The separation of functions solution was adopted in the APA, but in a compromised form.²⁸⁷ In its first encounter with the APA, the Supreme Court ex-

283. See, e.g., *United States v. Will*, 449 U.S. 200 (1980); 3 K. DAVIS, *supra* note 82, § 19.9; Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986). A similar reliance on "necessity," though not in the technical sense of the rule, supports the doctrine that judges may summarily punish contumacious insults in order to retain control of their courtrooms. See, e.g., *Taylor v. Hayes*, 418 U.S. 488, 497-98 (1974); but see Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 624-27 (1984) (questioning necessity) and Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. REV. 34 (1976).

284. Compare, e.g., *Will*, 449 U.S. 200 (1980) (federal judges can adjudicate constitutionality of decrease in their salaries) and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (state supreme court judges who are unnamed class members in suit against insurer are not disqualified from participating in formulation of decisive precedent) with, e.g., *Ward v. City of Monroeville*, 409 U.S. 57 (1972) (pecuniary interest invalidates "mayor courts" that assess traffic fines providing significant revenue source to municipalities) and *Gibson v. Berryhill*, 411 U.S. 564 (1973) (pecuniary interest invalidates optometry board's effort to outlaw rival faction of practitioners).

285. *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n.*, 426 U.S. 482, 492-93 (1976); *Withrow v. Larkin*, 421 U.S. 35, 54-55 & n.21, 58 & n.25 (1975); *United States v. Morgan*, 313 U.S. 409, 421 (1941); but see *Aetna Life Ins. Co.*, 475 U.S. 813, 820-21 (1986) (Burger, C.J.) (unsure whether procedural due process requirements extend to actual bias).

286. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41-45, *modified* 339 U.S. 908 (1950); REPORT OF THE ATT'Y GENERAL'S COMM. ON ADMIN. PROC. 56 (1941); REPORT OF THE PRESIDENT'S COMM. ON ADMIN. MANAGEMENT 40-41 (1937).

287. See 5 U.S.C. § 554(d) (1982) (separation of functions provisions for formal, on-the-record adjudications). These provisions do not apply, however, to less formal adjudications, initial licensing, much regulation of public utilities and carriers, or any deci-

tolled this approach and extended it to the deportation of a Chinese alien,²⁸⁸ only to be overturned by Congress at the urging of the Department of Justice.²⁸⁹ The Supreme Court accepted the correction, initially in view of the antiquity of the commingling of functions in immigration enforcement.²⁹⁰ Having once indulged a presumption that administrative adjudicators could overcome the influence of mixed roles, the Court has since rejected similar due process challenges in other fields of administration.²⁹¹ The Court has not wholly rejected the insights underlying the separation of functions approach,²⁹² but rather has emphasized the need for flexibility,²⁹³ and has relegated individuals to demonstrating actual bias in the particular case.²⁹⁴ Lower federal courts, however, have on several occasions disqualified, on due process grounds, individual administrative adjudicators who had formerly served in other positions entailing prosecutorial or investigative responsibility in a matter; the defense of necessity was not available in these cases.²⁹⁵

The traditional separation of functions issue is merely one illustration of the pressures on impartial decisionmaking resulting from the

sion made by the agency head or heads. *Id.* §§ 554(a), (d)(A,B,C). *See, e.g.,* Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 998-1001 (1978).

288. *See Wong Yang Sung*, 339 U.S. 33.

289. *See Marcello v. Bonds*, 349 U.S. 302, 306-10 (1955). Ironically, the Department of Justice did not long remain convinced of the necessity of combining functions in deportation, and gradually separated functions by regulation, culminating in the establishment of an independent Executive Office of Immigration Review in 1983. *See, e.g.,* T.A. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 87-90 (1985).

290. *Marcello*, 349 U.S. at 311.

291. *See Richardson v. Perales*, 402 U.S. 389, 408-10 (1971); *Withrow v. Larkin*, 421 U.S. 35, 52 (1975).

292. *See Withrow*, 421 U.S. at 51 ("That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial . . .").

293. *See id.* ("Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely."); *Richardson*, 402 U.S. at 410 ("It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.").

294. *See Withrow*, 421 U.S. at 54-55 & n.21, 58 & n.25.

295. *See American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979) (Commissioner who wrote opinion was formerly involved in case as General Counsel arguing exactly the same issue); *American Cyanimid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (former congressional investigator in case later appointed as Commissioner); *Trans World Airlines v. CAB*, 254 F.2d 90 (D.C. Cir. 1958) (Commissioner casting deciding vote was formerly Solicitor for the Post Office who signed its brief as party in the case); Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 786-87 (1981); *but see* Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1040 (1980) (disqualification of one commissioner would upset political balance of agency).

placement of adjudicative functions inside a specialized, programmatic agency. Agencies also may be tempted to distort cases into apposite vehicles for announcing policies;²⁹⁶ they may be conviction-prone because of their need for successes that can be used to justify their budget requests;²⁹⁷ and the various policy emphases of the day create other asymmetric incentives to error.²⁹⁸ Specialized agencies' need to dispense routinized justice to an enormous, often unrepresented body of claimants sometimes strains their capacity for individualized attention — mass deportation hearings provide a depressing example.²⁹⁹ The recent vigorous controversy over the administration of the social security disability benefits program simultaneously illustrates a number of ways by which a policy commitment can lead to evisceration of a right to a hearing. It is said that, in a ruthlessly determined effort to cut outlays, policy officials implemented a series of interferences that directly undermined the integrity of decisional processes.³⁰⁰ They required state adjudicators to apply secret and unauthorized presumptions regarding the employment prospects of the mentally disabled, which were not revealed and so could not be refuted.³⁰¹ They imposed productivity standards that reportedly denied federal administrative law judges

296. Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 201-02 (1981); see also S. BREYER & R. STEWART, *ADMINISTRATIVE LAW & REGULATORY POLICY* 405 (1979); Peck, *The Atrophied Rule-Making Powers of the NLRB*, 70 YALE L.J. 729, 758-59 (1961).

297. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 574 (3d ed. 1986); Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 810 (1971); cf. *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (integrity of adjudication undermined by interrogation of Chairman regarding pending case at oversight hearing).

298. See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (deportation hearing allegedly tainted by Attorney General's announcement of list of racketeers to be deported); *Anderson v. Department of Transp., Fed. Aviation Admin.*, 827 F.2d 1564 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 2005 (1988) (doctored records used for dismissal of air controllers as strikers).

299. See, e.g., *Fuentes v. INS*, 765 F.2d 886, *vacated*, 779 F.2d 29 (9th Cir. 1985) (record "inchoate" in hearing for workers rounded up in retaliation for reporting violation of minimum wage laws); *United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985) (simultaneous hearing for 33 aliens); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (rapid succession of deportation hearings and asylum interviews).

300. See, e.g., *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988); *Salling v. Bowen*, 641 F. Supp. 1046 (W.D. Va. 1986); Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 913, 917 (1984). I leave to one side the question of "nonacquiescence," *id.* at 925, which does not involve the problem of integrity of adjudication that concerns me here.

301. See *Bowen v. City of New York*, 476 U.S. 467 (1986); Weinstein, *supra* note 300, at 917-22. I recognize that in some instances it is difficult to distinguish a claim of biased decisionmaking from a claim of erroneous interpretation of law, and that I have maintained that the "some evidence" requirement is independent of authority to correct erroneous legal rulings. But the attempt to enforce a rule the existence of which the agency deliberately conceals goes beyond erroneous interpretation. See *Bowen*, 476 U.S. at 485; cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

(ALJs) an adequate opportunity to evaluate cases.³⁰² They singled out ALJs with high grant rates for a variety of bureaucratic sanctions, which courts held were intended to induce ALJs to deny benefits despite findings demonstrating disability.³⁰³ This is not to say that these "quality control" efforts were not provoked by valid policy concerns,³⁰⁴ but rather that bureaucrats sometimes transmute valid policy concerns into procedures that deny fair hearings.

Thus, administrative adjudicators are subject not only to the propensities to bias that may taint generalist judges and jurors, but also to systematic biases that may infect an entire agency. Internal agency review procedures, to the extent that they are available, may provide some protection against idiosyncratic biases of particular adjudicators.³⁰⁵ The existence of internal review is, however, no guarantee that such injustices will be corrected. Often internal review procedures are geared to reinforcement of agency policies, and not to justice for the parties.³⁰⁶ And internal review is unlikely to remedy policy-spawned biases. If anything, as the disability program illustrates, it may intensify these biases.

When the individual is relegated to demonstrating actual bias, the inquiry is often handicapped by uncertainty about what unlawful bias would look like if found. The traditional response to those who

302. See, e.g., D. COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE 141-49 (1985); Weinstein, *supra* note 300, at 924-25; Note, *The Case for Judicial Review of Veterans' Administration Benefit Determinations*, 2 ADMIN. L.J. 217, 221-22 (1988); Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 620-21 (1986). Recent allegations against the Veterans' Administration (VA) provide a more scandalous scenario of how productivity incentives can destroy adjudicative integrity; it is charged that financial rewards for case closing induced many claims adjudicators to deny claims outright rather than give claimants an opportunity to present needed evidence. See, e.g., *V.A. Under Attack at House Hearing*, N.Y. Times, Feb. 19, 1988, § 17, at 4, col. 1; *V.A. Powers Face Challenge at a Congressional Hearing*, N.Y. Times, Mar. 15, 1987, § 1, at 22, col. 5; HOUSE COMM. ON GOV'T OPERATIONS, INVESTIGATION OF DISABILITY COMPENSATION PROGRAMS OF THE VETERANS' ADMINISTRATION, H.R. REP. NO. 100-886, 100th Cong., 2d Sess. 5-7 (1988).

303. See, e.g., *Association of ALJs v. Heckler*, 594 F. Supp. 1132, 1142 (D.D.C. 1984); *Barry v. Heckler*, 620 F. Supp. 779 (N.D. Cal. 1985); *W.C. v. Bowen*, 807 F.2d 1502, *reh'g denied*, 819 F.2d 237 (9th Cir. 1987); D. COFER, *supra* note 302, at 119-30, 151-52; Weinstein, *supra* note 300, at 924-25.

304. See, e.g., J. MASHAW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARINGS SYSTEM 116-20 (1978) (recommending adoption of even-handed quality control policy).

305. See, e.g., Mashaw, *supra* note 247, at 810-16.

306. See *id.* at 802-04, 808-10; see also Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823, 833-34 (1980).

advocate separation of functions as an *ex ante* rule of disqualification has been that incorporation of adjudicators into the policy mission of the agency provides an essential strength of the administrative process.³⁰⁷ Not only is it natural that human beings will have some residual level of partiality, but the experience of conscientiously administering a program inevitably induces a measure of systematic bias. The pressures on impartiality are inseparable from the necessary coordination of agency policy. The tough-minded adherents of this view scored strongly in the debates preceding the APA, and achieved the many exceptions to its separation of functions provisions.³⁰⁸ Gerald Frug has recently rephrased their insight as a recognition of the incoherence of the supposed distinction between agency expertise and agency bias.³⁰⁹ He characterizes it as one of the contradictions on which liberal efforts to legitimate the administrative state founder.³¹⁰ And indeed, courts attempting to enforce impartiality requirements have had difficulty separating the working assumptions of an expert from the governing stereotypes of a bigot.³¹¹ The conventional articulation of the relevant state of mind — the capability of “judging a particular controversy fairly on its own circumstances”³¹² — does not describe the decisionmaker’s subjective state at all, but is simply a projection backwards of the desired result: a fair decision. It is not a “design standard,” but rather a “performance standard,”³¹³ and so affords little guidance to an inquiry that

307. See, e.g., J. LANDIS, *THE ADMINISTRATIVE PROCESS* 95-99 (1938); Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 994 (1978); Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 ILL. L. REV. 901, 934-35 (1941); REPORT OF THE ATT’Y GENERAL’S COMM. ON ADMIN. PROC. at 57-59.

308. See *supra* note 289.

309. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1324-26 (1984). For similar statements from more traditionally-minded observers, see *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); Gellhorn & Robinson, *supra* note 296, 216-17 (1981). See generally, Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987).

310. Frug, *supra* note 309, at 1286-87.

311. See, e.g., *Hortonville Joint School Dist. v. Hortonville Educ. Ass’n*, 426 U.S. 482, 492 n.4 (1975) (desire to be rid of union not disqualifying bias); *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) (disbelieving all management witnesses does not show pro-union bias); *Association of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1171-73 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (respondents failed to show Chairman’s mind “irrevocably closed”). Lower federal courts have occasionally disqualified adjudicators foolish enough to make strong public pronouncements on the individual merits of a pending adjudication, but continuing uncertainty over the correctness of these holdings further illustrates the difficulty of identifying administrative bias. See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); but see *Withrow v. Larkin*, 421 U.S. 35, 50 n.16 (1975) (“we need not pass upon their validity”); Strauss, *supra* note 295, at 1022-25 (questioning their correctness).

312. *Hortonville Joint School Dist.*, 426 U.S. at 493; *Withrow v. Larkin*, 421 U.S. 35, 55 (1975); *United States v. Morgan*, 313 U.S. 409, 421 (1941).

313. See S. BREYER, *REGULATION AND ITS REFORM* 105-06 (1982).

relies on circumstantial evidence and that avoids evaluating the merits. The resulting difficulty of identifying improper bias leaves administrators strongly shielded by the presumption of administrative regularity. They may be systematically subject to pressures of policy, and may have significant prior knowledge of the parties, but they are presumptively capable of overcoming these barriers to impartial decision.

The presumption of regularity lends the Court's rhetorical support to the task of legitimating administrative adjudication.³¹⁴ As Blackstone shrewdly observed, the law's reluctance to recognize bias or favor in a judge reflects the judge's status as one "who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."³¹⁵ Repeated findings of actual bias would seriously undermine the legitimacy of any tribunal, judicial or quasi-judicial. The personal focus of allegations of actual bias also makes them particularly disruptive.³¹⁶ Indeed, one of the virtues of *ex ante* rules of disqualification is that when a court overturns the decision of an administrator or judge because of failure to observe an *ex ante* rule, the court can reinforce the appearance of justice by insisting that only a technical rule has been broken.³¹⁷ Nonetheless, courts ought not to base their imprimatur solely on a patently disingenuous presumption. While "necessity" may require

³¹⁴ Federal administrative adjudication suffers a "legitimacy deficit" resulting from its incongruous relations with democratic theory and the constitutional frame of separated powers. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 262 (1985); see L. JAFFE, *supra* note 50, at 320-27; Stewart, *supra* note 268, at 1667, 1674-76. The Court has increasingly seen that the relevant inquiry concerns potential for abuse of power and not the historical identification of tasks performed by nineteenth century executive officials. *CFTC v. Schor*, 478 U.S. 833, 847-8, 853-54 (1986); *id.* at 3266 (Brennan, J., dissenting); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 587 (1985); *cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (even in historical "public rights" cases, judicial review may be required); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L. J. 197, 211-14 (attacking "public rights" doctrine). State administrative adjudication is not stigmatized by incompatibility with federal separation of powers principles, which do not apply, but its potential for abuse of power still raises due process concerns. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 416 (1986) (plurality opinion); Monaghan, *supra* note 314, at 262 n.184.

³¹⁵ 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1968).

³¹⁶ Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1467-68 (1981).

³¹⁷ See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 441 U.S. 564, 571, 579 (1973); *Mayberry v. Pennsylvania*, 400 U.S. 455, 468-69 (1971) (Burger, C.J., concurring); *In re Murchison*, 349 U.S. 133, 136 (1955); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 768 (6th Cir. 1966); Leubsdorf, *supra* note 309, at 243.

us to accept institutional arrangements that increase the risk of substantial bias, other protections must be afforded.

Given the strong presumption of regularity and the difficulties of access to the judicial or quasi-judicial mind,³¹⁸ reliance on the option of proving actual bias is cold comfort. For the same reasons, direct proof of a decisionmaker's inattention to the record is unlikely. Although in rare instances adjudicators flaunt their selectivity,³¹⁹ a court will resist scrutinizing their reading, and will usually ignore the amount of time they devote to a case.³²⁰

The "some evidence" requirement responds to this need. If the ex ante impartiality rules identify situations that are intolerably likely to result in an unfair hearing, "some evidence" review identifies decisions that are intolerably likely to have been produced by one. It is an "objective," ex post test for the evident denial of a fair hearing. Like the ex ante rules, it may be under- or overinclusive. Many unfair decisions will involve cases close enough to survive "some evidence" review. A few "some evidence" reversals may reflect nothing more than stupidity in the original decision. But "some evidence" review enables the courts to correct instances of egregious injustice resulting from procedural irregularities of constitutional dimension.

Some of the foregoing considerations apply to administrative agencies in particular, but others can arise as well with regard to courts, and especially with regard to beleaguered trial courts. We do not have to rely on the alleged absence of "parity" between state and federal trial courts³²¹ to find a need for "some evidence" review of trial court decisions, since federal trial judges themselves have not

318. See *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-31 (1947); *United States v. Morgan*, 313 U.S. 409, 422 (1941); 3 K. DAVIS, *supra* note 82, §§ 17.4, 17.5; Gellhorn & Robinson, *supra* note 296, at 216-17.

319. See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

320. See, e.g., *COMPACT v. United States*, 706 F.2d 1574 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 825 (1983); *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141 (2d Cir. 1974), *cert. denied*, 419 U.S. 874 (1974); *Florida Economic Advisory Council v. FPC*, 251 F.2d 643 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958); *but see Kelly v. Monaghan*, 9 A.D.2d 92, 191 N.Y.S.2d 632 (1959), *re-argument denied*, 9 A.D.2d 891, 194 N.Y.S.2d 912 (N.Y.A.D. 1 Dept., 1959) (police commissioner's same-day affirmance of discharge without waiting for transcript rebuts presumption of regularity).

321. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (state trial courts less protective of federal constitutional rights of individuals than federal trial courts); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 167-68 (1968). For initial efforts at empirical testing of Neuborne's claim, compare Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315 (survey of lawyers supports Neuborne's thesis) with Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (finding evidence of parity between federal district courts and state appellate courts by examining published opinions).

always lived up to standards of adjudicative integrity.³²² Some recognition, however, of the institutional bias of the federal courts toward serious attention to issues of procedural integrity and protection of unpopular minorities³²³ would suggest that the last word on "some evidence" review should not be left with the states. In many instances this will mean only an opportunity to request direct review in the Supreme Court, since the *Rooker* doctrine would prevent the lower federal courts from reviewing state court judgments that do not lead to a deprivation of physical liberty.³²⁴ But as *Thompson v. Louisville* illustrates, the states do not always provide review, even on constitutional questions, of a trial court's decisions.³²⁵ Moreover, as the sit-in cases indicate, there are sometimes circumstances in which a litigant cannot get a fair hearing anywhere in the state judicial system.³²⁶

In applying the "some evidence" test, the court should first iden-

322. See, e.g., *Offutt v. United States*, 348 U.S. 11 (1954) (judge "personally embroiled" with trial counsel); *Berger v. United States*, 255 U.S. 22 (1921) (bias against German-Americans).

323. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 510 (1963); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045, 1051-52 (1977); Neuborne, *supra* note 321, at 1126-27.

324. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). But see 28 U.S.C. § 2241 (1983) (federal habeas corpus for persons in custody in violation of the Constitution).

325. See *supra* note 129 and accompanying text.

326. See *supra* note 149 and accompanying text. Once we recognize that a state court judgment or state administrative order without "some evidence" to support it violates due process, it would appear obvious that state appellate exercises of "some evidence" review are themselves reviewable in the Supreme Court. See, e.g., *Superintendent v. Hill*, 472 U.S. 445 (1985). Or, at least, it would appear obvious were it not for *Parratt v. Taylor*, 451 U.S. 527 (1981) (adequate state post-deprivation remedy for "random and unauthorized" deprivation of property satisfies due process). Some lower federal courts have derived from a very broad reading of *Parratt* the conclusion that unanticipated procedural defects in the course of a state trial do not create federal constitutional violations so long as the state provides "adequate" opportunities for corrective process. See, e.g., *Holloway v. Walker*, 784 F.2d 1287 (5th Cir. 1986), *cert. denied*, 479 U.S. 984 (1986) (appeal adequate remedy for state trial judge's corruption); *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987) (state law certiorari adequate remedy for asserted due process violation in termination of state employee); see generally Blum, *Applying the Parratt/Hudson Doctrine: Defining the Scope of the Logan Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies*, 13 HASTINGS CONST. L.Q. 695 (1986). This analysis would preclude direct review in the Supreme Court as well. Properly understood, it is a *reductio ad absurdum* of the reasoning in many cases that attempt to apply *Parratt*. See Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979 (1986); Neuman, *Law Review Articles That Backfire*, 21 MICH. J.L. REF. ____ (1988) (forthcoming). But it is not yet clear how far the Supreme Court will prove willing to go with *Parratt*.

tify the factual findings on which the challenged decision is based.³²⁷ Findings of fact may be set forth explicitly in a written opinion, or it may be necessary to deduce them from conclusions of law or a finding of guilt framed by notice of the charges against the individual.³²⁸ The contested facts may simply be historical facts or they may inch out along the fact/law spectrum in the fashion of “ultimate” facts. If the latter, the court must be sensitive to the possibility that a superficially insupportable finding of fact actually reflects a disagreement over the governing legal standard — so long as the decisionmaker has not stumbled into prohibiting constitutionally protected conduct or violating due process notice requirements, a court without authority to correct the tribunal’s legal errors should not overturn a decision that merely applies the wrong legal standard. The court should seek support for the findings by examining the entire “record” on which the decisionmaker was permitted to rely.³²⁹ Its inquiry is whether the discrepancy between the findings and the evidence is so great as to indicate clearly that the findings were not in fact derived impartially from the record. This inquiry might be aided by judicial notice of relevant features of the agency’s structure, caseload, or operations, which shed light on the plausibility of

327. In *Vachon v. New Hampshire*, 414 U.S. 478 (1974), the Court properly rejected Justice Rehnquist’s absurd suggestion that due process permits a conviction without “some evidence” relating to one element of the offense if there is “some evidence” relating to other elements. *Id.* at 484 (Rehnquist, J., dissenting). So long as the Court is careful not to add its own elements to state law offenses, it must guarantee the individual a fair trial on all relevant issues, even if some are indisputable.

328. I have been assuming throughout, *see supra* notes 7-8 and accompanying text, that the challenged decision indicates clearly enough what the factual findings were or would have to have been, so that the findings can be compared to the evidence of “record.” I should point out here that the “some evidence” test is sometimes employed by the Supreme Court as a means of clarifying ambiguous decisions: the decision could not lawfully have been based on ground X because there would be “no” evidence to support it, therefore it must be based on ground Y, which is unconstitutional for a different reason. Alternatively, if the decision was based on ground X it fails the “some evidence” requirement, and if it was based on ground Y it fails some other requirement. *See, e.g., Douglas v. Buder*, 412 U.S. 430 (1973); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *cf. Johnson v. Florida*, 391 U.S. 596 (1968) (court avoids other due process challenges by construing vagrancy statute literally and finding no evidence). Some of these cases were civil rights cases in which one might suspect that the original tribunal was determined to punish the defendant (*e.g., Gregory*, 394 U.S. at 111, *Barr*, 378 U.S. at 146). In the others, I think, there is no real doubt about the integrity of the hearing; rather there is reason for confidence that ground X was not the basis of the decision. While I find this application of the “some evidence” requirement unobjectionable, it is unclear to me why the Court could not employ a *more* stringent test than “some evidence” (*e.g., rationally sufficient evidence*) in determining the actual basis of decisions under review. The current practice may simply be a holdover from the days when “no evidence” indicated an inadequate state ground that would not preclude direct review on writ of error. *See infra* text accompanying notes 503-4.

329. This may require in camera review of portions of the record that were permissibly shielded from the individual. *See, e.g., Ponte v. Real*, 471 U.S. 491 (1985).

the individual's claim of bias or abuse of the record. The individual must show more than that the decision was wrong, more even than that the evidence was not rationally sufficient, for the "some evidence" requirement serves to guard the integrity of the hearing, not to guarantee the substantive rationality of its outcome. Although one can rarely exclude altogether the possibility that the discrepancy resulted from innocent but gross stupidity, it should suffice if the court finds that, in context, the discrepancy clearly indicates denial of a fair hearing. The individual should not, however, have the burden of proving a specific charge of actual bias by a preponderance of the evidence or by clear and convincing evidence; "some evidence" review is an *alternative* to proof of actual bias.

In conducting this inquiry, a court necessarily examines interpretations of the legal rules that purportedly governed the decision, and the inferences that may be drawn from the evidence of record. Thus, the court cannot help but bring its own assumptions and values to bear in some measure on a process of factfinding and legal interpretation assigned to a different tribunal, possibly within a different legal system. Nonetheless, the court does so as an unavoidable part of probing the fairness of the original hearing. The court is not asserting the superiority of its sense of reasoning or factfinding, but rather is employing its own reason and its empirical feel, as it must, in carrying out its particular function as guardian of constitutional minimum standards of procedural integrity. "Some evidence" review differs in this regard from the notion of substantive due process rational sufficiency review that I discussed earlier,³³⁰ a process in which the court's brand of rationality is preferred for its own sake, to increase the rationality (as perceived by the court) of the tribunal's outcomes. Sufficiency review also gives the court less leeway to accommodate tribunals' interpretations of their own law than "some evidence" review. Thus, the procedural account of the "some evidence" requirement still creates risks of displacing state authority, but the risks are smaller than in the substantive due process account.

In passing, let me emphasize a disagreement with Justice O'Connor's description of "some evidence" review in *Superintendent v. Hill*.³³¹ As in applying the substantial evidence test to the whole record,³³² a court engaged in "some evidence" review must be willing to address all the evidence, not merely the evidence that supports the

330. See *supra* notes 204-229 and accompanying text.

331. 472 U.S. 445 (1985); see *supra* notes 171-75 and accompanying text.

332. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

finding. A witness might correct a slip of the tongue, incontrovertible evidence might demonstrate that she could not have been at the scene of the crime as she claims, or a convincing recantation might destroy her prior testimony so effectively that only a biased tribunal would continue to rely on it. Moreover, the Chinese immigration cases, in which the “some evidence” requirement originated, illustrate that the rule does not mandate universal acceptance of purported credibility findings.³³³ Once the “some evidence” requirement is understood as an inquiry into the fairness of the hearing and not a formalistic requirement imposed at the hearing,³³⁴ limiting attention to the evidence that supports the finding would undermine the purpose of the requirement.

The “some evidence” rule, like the *ex ante* rules, permits the court to avoid an attack on the personal integrity of the decisionmaker, even while insisting that she somehow failed to provide a fair hearing. This may be viewed as either a strength or a weakness of the rule. “Some evidence” review concentrates on providing individual justice. It does not prospectively rectify systematic distortions in the adjudicative process, nor, as currently practiced, does it even identify explicitly the distortion suspected of causing the injustice.

“Some evidence” review may therefore fail to carry out what some writers consider the preeminent purpose of constitutional adjudication — the articulate elaboration of constitutional values.³³⁵ In fact, one of the circumstances that has necessitated the length of this article has been the relative opacity of the Court’s demand for “some evidence” in the leading cases. On the other hand, it is hard to believe that the tribunals suffering reversal in those cases did not understand the sins of which they were suspected. Louis Lusky’s brief in *Thompson v. Louisville*, for example, illustrates the conventions of this discourse well. It correctly states the superficially governing principle that “[h]aving established that the judgments cannot be based on any lawful premise, petitioner need not go further and show what particular unlawful premise they were based on.”³³⁶ Of course, it then goes on at length to describe the unlawful premise. No lawyer could hope to overcome the presumption of constitutionality without suggesting some alternative explanation for how the decision miscar-

333. See *supra* notes 11-45 and accompanying text; see also *Dickinson v. United States*, 346 U.S. 389, 396 (1953).

334. See *supra* text accompanying notes 199-203.

335. See Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29-31 (1979); see also J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 230-31 (1985). I do not mean to attribute to these authors an insensitivity to justice in the individual case; rather, their emphasis suggests a potential criticism that should be answered.

336. Brief for Petitioner, at 24; *Thompson v. City of Louisville*, 362 U.S. 199 (1960). (emphasis deleted).

ried. Indeed, the content of the "some evidence" requirement as I have explained it — that the discrepancy between the findings and the evidence must be so great as to indicate clearly that the findings were not in fact derived impartially from the record — entails that the less plausible the claim of partiality, the greater the discrepancy will have to be to persuade a court that the decision was unlawful. The underlying concerns of bias in the Chinese immigration cases, the Jehovah's Witness cases, the civil rights movement cases, and even in the prison discipline cases³³⁷ were unmistakable.

Thus, although the superficial message of "some evidence" reversals is merely a blanket reaffirmation of the requirement of conscientious, impartial decisionmaking on the record, there usually will be a subtext informing the tribunal precisely how it fell short. Attentiveness to these subtexts may lead the agency itself, or its executive or legislative superiors, to undertake systematic reform. Alternatively, repeated case-by-case exposure to "some evidence" claims in an area may eventually lead the Court to develop more explicit solutions to the recurring problem. Both these processes occurred, for example, in the immigration area. A decade after *Tang Tun v. Edsell*,³³⁸ the Court took away the power of executive officials to make final determinations of nonfrivolous citizenship claims in deportation proceedings.³³⁹ In 1940, Congress itself extended the availability of de novo judicial determinations of citizenship in a declaratory judgment action to aliens not inside the United States.³⁴⁰

Moreover, to condemn "some evidence" review for providing individual corrective justice rather than a broader elaboration of values would unduly deprecate the role of Article III courts in protecting specific individuals in specific cases. The federal courts exist not only to articulate norms, but also to dispense impartial justice in concrete controversies. The diversity and alienage jurisdictions of the federal courts, for example, were founded on a concern to guarantee impartial court proceedings in cases where the federal courts have no inde-

337. I say "even" only because the Supreme Court found some evidence to support the finding. *Superintendent v. Hill*, 472 U.S. 445, 456 (1985).

338. 223 U.S. 673 (1912).

339. *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

340. Nationality Act of 1940, § 503, 54 Stat. 1137, 1171-71 (1940). Twelve years later, responding in part to a new wave of Chinese immigration, Congress contracted the 1940 remedy, but the Supreme Court then held that this action did not affect the availability of declaratory relief under the Administrative Procedure Act. *See Rusk v. Cort*, 369 U.S. 367 (1962); Roche, *The Expatriation Cases: "Breathes There The Man With Soul So Dead. . ."*, 1963 SUP. CT. REV. 325, 348-51.

pendent norm-elaborating authority.³⁴¹ Justice Brandeis insisted in *Ng Fung Ho* that the “difference in security of judicial over administrative action” required independent judicial factfinding in *every* case where an individual opposed the executive’s deportation efforts with a nonfrivolous claim to citizenship.³⁴² One does not have to subscribe to the narrowest contemporary conceptions of “standing” and “case or controversy”³⁴³ to see constitutional value in judicial resolution of individual disputes.

Nonetheless, “some evidence” review does have a very limited reach. While the court corrects egregious cases of injustice, its action affords no direct protection to individuals who will present similar cases to the same decisionmaker in the future. In addition, the court will not intervene at all in cases where the evidence is less one-sided. The absence of systemic relief after finding a violation reflects in part the judicial presumption that other government actors are capable of mending their ways, and in part the relaxed showing that suffices under the “some evidence” test. The finding that “some evidence” was lacking indicates an unfair decisionmaking procedure, but does not definitively demonstrate the cause of the defect. If the court has enough direct and circumstantial evidence to demonstrate actual bias, it can decide the case on that ground and tailor its relief accordingly. The lesser showing made on “some evidence” review may call for increased vigilance in future “some evidence” cases from the same tribunal, but does not immediately justify a conclusion that the tribunal will be unable to provide the substance or appearance of justice in similar cases. A series of “some evidence” cases from the same tribunal may eventually require the court to rethink whether the structure that apparently induces bias is truly justified under the rule of “necessity;” I would characterize any impatience with a court’s slowness to do that rethinking as a criticism of rules and practices regarding proof of actual bias, and would prefer to disclaim it as beyond the scope of this essay.³⁴⁴

341. See, e.g., THE FEDERALIST NO. 80 (J. Madison) (J. Cooke ed. 1961).

342. *Ng Fung Ho*, 259 U.S. at 285; see also *Wong Wing v. United States*, 163 U.S. 228 (1896) (prohibiting imprisonment at hard labor of deportable alien without judicial trial).

343. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Warth v. Seldin*, 422 U.S. 490 (1975); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals. . .”).

344. Similarly, I would treat as a separate issue regarding proof of actual bias the courts’ failure to intervene in cases that are too close for due process defects to be apparent from the record itself. My earlier discussion of a substantive due process account of the “some evidence” requirement, (see *supra* notes 204-229 and accompanying text), called attention to the dangers of excessive entanglement in the interpretation of state law that would result from universal scrutiny of the rational sufficiency of evidence; thus I would not recommend using that standard as a more stringent safeguard against actual

B. Reasoning the Need

One might consider the discussion just completed a sufficient defense of the "some evidence" requirement. But we live in an age in which, as Auden warned,

A second-hand acquaintance of Pareto's
Ranks higher than an intimate of Plato's.³⁴⁵

It therefore seems necessary to consider the implications of the balancing approach of *Mathews v. Eldridge*³⁴⁶ for the "some evidence" requirement. (Readers who are not interested in the *Eldridge* balancing approach may proceed instead directly to Part V.³⁴⁷).

A difficulty arises the moment one contemplates this task. "Some evidence" is a standard of judicial review and not a procedure employed by the original tribunal. If the question were whether a tribunal ought to be authorized to make findings knowing that they are not supported by "some evidence," then the answer from a cost-benefit point of view would be clear. When the tribunal intends to ignore the evidence, it merely wastes money by holding a hearing at all. Less intemperately put, I have been hypothesizing throughout that we are dealing with a context in which due process requires the tribunal to hold a hearing and base its decision impartially on the evidence of "record."³⁴⁸ That judgment already entails that the reception of evidence is necessary to the accuracy of the decision, and for the tribunal deliberately to override the evidence leads to inexcusable error.

Thus, the real question under *Eldridge* would be whether due process balancing justifies a requirement of judicial review under the "some evidence" standard. That necessarily takes us into ill-charted territory for cost-benefit balancing; the Supreme Court has never held that the *Eldridge* approach even *applies* to claims of a constitutional right to judicial review.³⁴⁹ For example, in the Court's important, recent decision in *United States v. Mendoza-Lopez*,³⁵⁰ which

bias.

345. W.H. Auden & L. MacNeice, Letter to Lord Byron, in *LETTERS FROM ICELAND* 52 (1967 ed.).

346. 424 U.S. 319 (1976).

347. For anyone who has read this far, and yet is innocent of what the phrase "*Eldridge* balancing approach" connotes, I will recapitulate shortly.

348. See *supra* notes 7-8 and accompanying text.

349. As opposed, I hasten to add, to a constitutional right to a tier of *administrative* review, see *Schweiker v. McClure*, 456 U.S. 188 (1982), an issue entirely different in character.

350. 107 S. Ct. 2148 (1987).

held that due process prohibited conviction of an alien for violating a deportation order unless there was some opportunity for judicial review of the order's validity, none of the Justices cited any of the *Eldridge* line of cases or alluded to a need to consider the "costs" of judicial review. The majority found guidance in the classic administrative law cases of the forties, including our friend *Estep*,³⁵¹ and in the role of judicial review in assuring the legitimacy of administrative adjudicative proceedings.³⁵² Although the Court spoke in terms of the ability of Congress to give effect to an administrative *finding* in a subsequent criminal proceeding, the case really dealt with an attempt by Congress to use criminal sanctions to give effect to an invalid administrative *order*.³⁵³ Under either view, the foundation of these cases is the unique responsibility of the judiciary to assure itself that constitutional limits on government power have been maintained.³⁵⁴ The interests involved are wholly unsusceptible to quantification and cost-benefit balancing.

The Supreme Court would surely admit that *Eldridge* does not set forth a comprehensive framework under which all procedural due process questions must be decided. The Court has regarded some procedural due process issues as so adequately framed by pre-*Eldridge* case law that it resolves them without even mentioning the balancing approach in passing.³⁵⁵ On the other hand, as *Eldridge* balancing has increasingly colonized the domain of due process, it has developed some disturbing syncretist tendencies. Even staunch *Eldridge* supporters have thrown into the balance doctrinal presumptions,³⁵⁶ reasoning by analogy from non-*Eldridge* precedents,³⁵⁷ and

351. *Id.* at 2154-55 (citing *Estep v. United States*, 327 U.S. 114 (1946), and *Yakus v. United States*, 321 U.S. 414 (1944)).

352. *Id.* at 2155 n.15.

353. *Mendoza-Lopez* was being prosecuted for unauthorized reentry to the United States after having been deported. The criminal proceeding actually did not turn on the immigration judge's *finding* of deportability, but rather on the undeniable fact of *Mendoza-Lopez*'s deportation under the questioned order. If, for example, *Mendoza-Lopez* had later lied on the witness stand about having been deported, he could presumably have been punished for perjury. *Cf.* 107 S. Ct. at 2159-60 (Scalia, J., dissenting) (commenting on majority's difficulty in distinguishing *Lewis v. United States*, 445 U.S. 55 (1980)). The difference is that the ban on reentry attempts to use the courts to give effect to the alien's deportation, rather than merely treating it as a relevant historical fact.

354. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion); *United States v. Brown*, 381 U.S. 437, 462 (1965); *Estep*, 327 U.S. at 127 (Murphy, J., concurring); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936).

355. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (Burger, C.J.) (bias of judge in civil appeal); *Atkins v. Parker*, 472 U.S. 115 (1985) (rulemaking/adjudication distinction); *California v. Trombetta*, 467 U.S. 479 (1984) (destruction of exculpatory evidence); *Rock v. Arkansas*, 483 U.S. 44 (1987) (defendant's right to testify).

356. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (Stewart, J.) (throwing into the balance presumption of right to appointed counsel only where physical liberty is threatened); *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*,

other incommensurable factors.³⁵⁸ This suggests a danger, at least, that issues of judicial review may someday be subjected to some kind of balancing. I will therefore expand my defense of the "some evidence" requirement to include an inquiry into its "costs" and "benefits." First, I will try to perform an orthodox *Eldridge* accuracy analysis, and then I will modify the analysis by emphasizing some additional factors that seem especially appropriate to a cost-benefit analysis of a right to judicial review. In both cases, I will try to remain within the constraints of the respective methodologies as I understand them; I hope I will not thereby earn the dual reproach that I am doing poorly something that should not be done at all.

1. *The Accuracy Approach*

(0.1) Justice Powell's opinion in *Mathews v. Eldridge* invokes a balancing test involving three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁵⁹

This accuracy-dominated approach builds on the Court's entitlement doctrine by presuming a government program that is designed to achieve particular social goals and that employs certain objective criteria in determining whether the private claim of entitlement is to be recognized or defeated. The program is administered by either a court or a nonjudicial agency, which in either case I will call the "tribunal." In such a context, one can distinguish two types of possible errors that the tribunal could make — erroneous rejection of a "correct" claim (the false negative), and erroneous acceptance of an

426 U.S. 482, 497 (1976) (Burger, C.J.) (invoking "presumption of honesty and integrity"); and even worse, *Parham v. J.R.*, 442 U.S. 584, 618 (1979) (Burger, C.J.) (throwing into the balance *state* law presumption that state will protect a child's general welfare).

357. *Ponte v. Real*, 471 U.S. 491, 495-99 (1985) (Rehnquist, J.); *Lassiter*, 452 U.S. at 25 (Stewart, J.); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 15-16 (1979) (Burger, C.J.); *Vitek v. Jones*, 445 U.S. 480, 488-94 (1980) (White, J.); *Addington v. Texas*, 441 U.S. 418, 427-32 (1979) (Burger, C.J.); see J. MASHAW, *supra* note 335, at 107-08.

358. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (additional deference required because statute is old); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature").

359. 424 U.S. 319, 335 (1976).

"incorrect" claim (the false positive).³⁶⁰ The Court entertains requests by litigants for proposed procedural changes that would improve accuracy in the sense of decreasing the proportion of false negatives. Cost-benefit analysis of the proposal would require a comparison between the social gains from reducing false negatives and the social losses from the costs of the procedure itself ("administrative costs") and from any concomitant increase in false positives ("positive error costs").³⁶¹ From this perspective, the "private interest" represents a portion of the social gains from accurate recognition of entitlement claims.³⁶² The "Government's interest" represents the social losses, including both administrative costs and positive error costs. If the government's interest is to be taken in the aggregate, then the private interest must be defined as including all the erroneously rejected claims.³⁶³ A comparison between the private interest and the government function involved indicates the relative weights that should be given to avoidance of false negatives and avoidance of false positives.³⁶⁴ Even when the entitlement involved is a claim to fungible property, the social value ascribed to the private interest need not be limited to the market value of the property.³⁶⁵

(0.2) What can we say in general about the implications of this schema for the "some evidence" requirement? Without specifying a particular government program, it is of course impossible to assess the weights assignable to the private interest and the government function involved. We have hypothesized, however, that the private interest is sufficient in the light of the government's countervailing interests to require notice and a hearing and a decision impartially

360. In using this terminology, I assume an adjudicative model in which the only parties are the original tribunal, whether court or agency, on one side of the issue and private individuals on the other. If there were private parties with opposing interests, then we would have to bear in mind that one party's false negative is another party's false positive. *See, e.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

361. The proposal might improve accuracy in both directions, decreasing both the false negatives and the false positives; in that case, this factor weighs in *favor* of the proposal.

362. Some of the benefits of the program may accrue to the government or to third parties; a full estimate of the social gains of accurate decisionmaking would therefore include portions of the "Government's interest, including the function involved." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 554 (1985); *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 28 (1981); *Addington v. Texas*, 441 U.S. 418, 425 (1979).

363. *See Mashaw, supra* note 272, at 38.

364. *See Addington v. Texas*, 441 U.S. 418, 427 (1979); *but see infra* notes 403-04 and accompanying text (degree of social disutility may depend on factors in addition to direction of error).

365. *See Eldridge*, 424 U.S. at 340 (comparing need of Aid to Families with Dependent Children recipients and disability recipients, not their benefit levels); J. MASHAW, *supra* note 335, at 116; *contra Sutton v. City of Milwaukee*, 672 F.2d 644, 645-46 (7th Cir. 1982) (Posner, J.).

made on the basis of record evidence.³⁶⁶ This indicates that the government's interest is not so overwhelming relative to the private interest as to justify totally formless procedures.

a. Positive Error Costs

(1.1) We should turn next to the costs imposed by "some evidence" review. First, to what extent does review lead to positive error costs? A decision which properly fails the "some evidence" requirement has little to recommend it from the point of view of accuracy. The tribunal may have reached an objectively correct decision, but the only cause for confidence in the result would be blind trust. It is important to recognize here that a false positive means an incorrect ultimate decision on the merits of the entitlement claim — for accuracy analysis, the court's reversal of a tribunal decision not supported by "some evidence" creates a positive error only if the tribunal's decision was correct, and not if the decision was impartial and conscientious but wrong.

(1.2) We should probably distinguish two categories of cases that fail the "some evidence" test.³⁶⁷ In the first category, the claimant develops her evidence but the tribunal defaults in its obligation to make a case for the government, and then decides against the claimant anyway. On the merits of the entitlement claim, these outcomes may be fairly randomly distributed among false and true negatives. In some of these cases, then, an accurate application of the "some evidence" test would result in a false positive if the court sets aside the tribunal's decision without remanding to give it a second chance to do its job right.

(1.3) In the second category, the record has been developed adequately enough to permit a reasonably accurate decision³⁶⁸ and the tribunal makes its decision in the teeth of the evidence. These outcomes will virtually always be false negatives. This would mean that, if courts always applied the "some evidence" test correctly, and if litigants only sought "some evidence" review in cases that failed the

366. See *supra* text accompanying notes 7-8.

367. I suppose there is a third category, those in which the tribunal makes a decision in favor of the private party without "some evidence" to support it, but this category will not end up in court, because the private party has no incentive to seek review of false positives, and the tribunal cannot. See *supra* note 360.

368. See R. POSNER, *supra* note 297, at 532 (increased litigation expenditures justified by production of more information, which decreases probability of tribunal error); Shepsle, *Official Errors and Official Liability*, 42 LAW & CONTEMP. PROBS. 35, 39-40 (Winter 1978).

test, then virtually the only social cost for this category would be the cost of the litigation.

(1.4) These last assumptions, however, are too heroic by far. We must take into account the likely prospect that courts will sometimes err in applying the "some evidence" standard, and that private litigants will seek review in losing cases. (It should be borne in mind that in this context a decision by a "court" is a decision by one or more judges, not by a jury. "Some evidence" review will frequently be sought on habeas corpus or in an equitable proceeding for injunctive or declaratory relief. Even if the procedural vehicle is a section 1983 or *Bivens* damage action,³⁶⁹ the application of the "some evidence" rule to the record is an issue of law for the court, not an issue for a jury.) From the standpoint of accuracy on the merits, the courts' errors still should not trouble us much. Once the record is adequately developed, the "some evidence" test leaves much room for error before a court will actually turn a true negative into a false positive on the merits.³⁷⁰ A court might go far astray, however, if it overreached its competence in reviewing findings of tribunals with specialized training beyond the court's comprehension. Ordinarily, then, the substantial costs of the "some evidence" standard are likely to be the *administrative* costs, which we should consider next.

b. Administrative Costs

(2.1) Administrative costs include not only the litigation costs themselves,³⁷¹ but also any lessening of the efficacy of the government's program resulting directly from the availability of review pro-

369. Judges and many administrative decisionmakers enjoy (in both senses) absolute immunity from damage suits for constitutional torts. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478 (1978). But decisionmakers in less formal settings may enjoy only qualified immunity, which does not shield them from liability for actions that they should have recognized as violating clearly established constitutional rights. *See, e.g.*, *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (qualified immunity of prison disciplinary boards). It should not take too many cases for the right to a decision based on "some evidence" to become clearly established in a particular field of administration, *if it is not already*.

370. We must still reckon, however, with true negatives that the agency produces at random by ignoring its own inadequate record; we will have to weigh the costs of the court's false positives against the benefits of giving the agency an incentive to develop its case. *Cf.* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 409 (1973) (reduction of error costs justifies modification of burden of proof to create incentives for fuller development of evidence).

371. The litigation costs are not restricted to the expenditures on litigation by the parties, but also include the costs of providing courts. It has been argued that increases in the caseload of the federal courts impose more costs than just the salaries of additional judges, because there are limits on the size the federal judiciary can attain without a sacrifice in quality. If this were so, then the cost of providing courts would include not only the pecuniary cost but also the opportunity cost of distracting qualified judges from other litigation that had an arguably greater claim on federal jurisdiction. *See, e.g.*, R. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* 96, 181 (1985); Olson, *Official Liability and Its Less Legalistic Alternatives*, 42 LAW & CONTEMP. PROBS. 67, 79 (Winter 1978).

ceedings in nonmeritorious cases, friction between the courts and the tribunal, and possible distortions in the tribunal's behavior resulting from the prospect of review. Nonetheless, it is important to remember that the costs relevant to the analysis are all incremental costs — that is, the additional costs of affording "some evidence" review *given* the existence of other procedures, which may or may not include judicial review of other alleged procedural due process defects in the decision, based on direct proof of actual bias, refusal to permit testimony of witnesses, admitted use of nonrecord evidence, and so forth.

i. Direct Lessening of Efficacy Costs. (2.2.1) One means by which the availability of review could impair the government's program would be unrecoverable continuation of benefits to the claimant pending review.³⁷² This may entail payment of money, permitting certain conduct, or simply leaving the claimant at liberty. In extreme cases of irreparable government action, a stay pending review is a virtual necessity, but more often, equitable discretion governs maintenance of the status quo under a cost-benefit analysis of its own.³⁷³

(2.2.2) Second, even if stays are uniformly denied, the prospect of appellate delay may undermine the prompt certainty deemed necessary for optimal deterrence of prohibited conduct.³⁷⁴ Moreover, since judicial review postpones the moment of finality, future actions of the tribunal may be rendered uncertain by risk of reversal.

(2.2.3) Third, allowing the claimant to seek judicial review on "some evidence" grounds may undermine the relationship between the claimant and the tribunal, or may give the claimant a vehicle for disruption; the Court has been particularly alert to such costs in institutional settings like schools and prisons.³⁷⁵

372. See *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976); *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975).

373. See *Barefoot v. Estelle*, 463 U.S. 880 (1983) (standards for denial of stay of execution pending collateral review); *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); R. POSNER, *supra* note 297, at 522; *but see Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n.1 (7th Cir. 1986) (simply phrased economic test not accurate).

374. *Mackey*, 443 U.S. at 18; J. BENTHAM, *THE THEORY OF LEGISLATION* 326 (Ogden ed. 1931); Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 294 (1983); Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 128 (1975).

375. *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1, 13-14 (1979); *Vitek v. Jones*, 445 U.S. 480, 496 (1980); *Parham v. J.R.*, 442 U.S. 584, 610 (1979); *Ingraham v. Wright*, 430 U.S. 651, 680-81 (1977); *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978).

(2.2.4) In cases where judicial review is already being pursued on other issues, it seems unlikely that adding "some evidence" review could significantly increase any of these costs. Review on the tribunal's record is far quicker and less disruptive than litigation that requires the court to make new findings of fact, or the tribunal to articulate further justifications for its actions. On the other hand, making "some evidence" review available should increase the *frequency* of judicial review to an undetermined extent, thereby increasing the incremental costs.³⁷⁶ It is easy to allege bias (though hard to prove it), but it is even easier to allege the failure of evidence.³⁷⁷ Moreover, the inevitably fact-bound nature of "some evidence" review will result in lesser predictability of outcomes, which would probably tend to increase the volume of litigation.³⁷⁸

ii. *Friction Costs.* (2.3) Another cost, though a fairly abstract one, is the friction that "some evidence" review may create between the federal courts and the state or federal-administrative tribunals being reviewed.³⁷⁹ It is unclear whether the Supreme Court would count this regrettable reaction as a legitimate factor in the balance.³⁸⁰ Remembering, however, that our analysis must concentrate on incremental costs, we should recognize that case for case, a reversal on "some evidence" grounds may provoke less resentment than a reversal expressly predicated on a finding of actual bias, laziness, or

376. See, e.g., *Eldridge*, 424 U.S. at 347; *Mackey*, 443 U.S. at 18.

377. For example, a study of a large sample of habeas corpus filings in the mid-1970's found that 22.4% of the petitions attacking convictions contained "some evidence" claims, making this ground the third most common type of claim. Allen, Schachtman, & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 759-60 (1982). By contrast, only three percent claimed judicial misconduct. *Id.* This does not necessarily mean that "some evidence" review greatly increased the number of filings; nearly 80% of all petitions alleged two or more grounds of invalidity, and over 50% alleged three or more. *Id.* Only five of the 367 "some evidence" claims were successful, less than half the average success rate of 3.1%. *Id.* at 764, 766-67. In contrast, David Shapiro's earlier study of habeas petitions in Massachusetts found insufficiency of evidence claims in only 11 of the 146 petitions challenging convictions (i.e., 7.5%); none of these claims led to release. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 331, 340 (1973).

378. See R. POSNER, *supra* note 371, at 245; Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL. STUD. 1, 9, 19 (1984).

379. See, e.g., P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 162-63 (1983); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 520-21 (1982).

380. See *Ponte v. Real*, 471 U.S. 491 (1985) (finding little difference between requiring contemporaneous statement by prison disciplinary board of reason for denying witness request and allowing postponing statement until prisoner sues); *Schweiker v. McClure*, 456 U.S. 188, 198 (1982) (assuming additional cost and inconvenience of having administrative law judges review insurance carrier determinations not unduly burdensome); but see *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (federal injunction of state proceeding inappropriate because "unseemly" and could be interpreted as "reflecting negatively upon the state court's ability to enforce constitutional principles").

corruption. Similarly, review on the record may generate less friction than review involving fresh factfinding after subjecting tribunal personnel to discovery or in-court examination. This once more suggests that, where judicial review is already being pursued on other issues, the incremental costs of "some evidence" review may not be large. Judicial review should, however, be more frequent.

iii. Distortion Costs. (2.4.1) The third category of costs results from the distortion of the tribunal's behavior in future administration of the program in order to compensate for the prospect of judicial review. For example, the tribunal may devote more time to writing defensible decisions; indeed I have *not* been assuming in this article that due process requires the tribunal to write a decision at all. Sometimes the Court excuses tribunals from writing detailed opinions merely to save them time and effort.³⁸¹ It has excused others in the belief that their modes of decisionmaking (particularly what the Court considers "evaluative" or "predictive" decisionmaking by professionals or quasi-professionals)³⁸² do not necessarily lend themselves to written exposition.³⁸³ To the extent that this latter belief is justified, "some evidence" review could prod decisionmakers into counterproductive opinion writing, and possibly would induce them to avoid decisions that, though valid, could not be justified adequately in writing to "lay" judges. Common sense also suggests that excessive opinion writing would be a drain on staff and resources that might be better employed in providing benefits or services.³⁸⁴

381. Compare *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (requiring written statement of reasons and evidence relied upon in prison disciplinary proceedings) and *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973) (requiring written statement of reasons for denial of counsel in probation revocation proceedings) with *Ponte*, 471 U.S. at 496 (no need for contemporaneous written statement of reasons for denying inmate's request to call witness in disciplinary proceeding); *Black v. Romano*, 471 U.S. 606, 611 (1985) (no need for written statement for rejecting alternatives to revocation of probation); cf. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12 n.12 (1978) (dictum) (caseload a "relevant factor" in deciding whether written decision appropriate).

382. See generally Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077 (1984).

383. See, e.g., *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1, at 15-16 (1979) (grant or denial of parole); *Parham v. J.R.*, 442 U.S. 584, 607-10 & n.18 (1979) (psychiatric commitment of children); *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978) (academic evaluations).

384. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Parham*, 442 U.S. at 606. Conceivably, however, the procedural requirements instead will lead to an increase in the tribunal's budget, which may be what bureaucrats yearn for. See J. MASHAW, *supra* note 335, at 138; W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

Moreover, a tribunal that was not required to maintain a full record of its proceedings might deliberately truncate its documentation in order to frustrate review.

(2.4.2) The impact might be more systematic, and might lead the tribunal to amend its substantive rules. The Supreme Court, on several occasions, has weighed as a government interest the danger that requiring excessive procedures would lead the state to modify or abandon its program.³⁸⁵ "Some evidence" review could induce the tribunal to make its decisions turn on objective criteria for which evidence is more easily adduced.³⁸⁶ This may exacerbate the already troublesome tendency of regulators to prefer rules that are easily enforced, even if their prescriptions fit imperfectly to their purposes.³⁸⁷

(2.4.3) Instead, the tribunal may simply become more cautious in deciding cases. Once the tribunal understands the facts that lead the court to reverse, it may overcompensate. For example, if a draft board recognizes that courts suspect it of bias against particular religious groups, it may lean too far in their favor. If a tribunal with both prosecutorial and adjudicative functions concludes that the courts sense a bias toward respondents against whom the tribunal has sought preliminary relief, it may be unduly cautious in later proceedings in such cases. Some degree of compensation for unintended biases is appropriate, but fear of reversal might prompt a tribunal to retreat too far, shifting the allocation of error risks between the respondent and the public away from its optimum point.

(2.4.4) How likely are these distortions to materialize? It should be noted that all of them result from the *tribunal's* perception of a substantial probability that the courts will overturn a finding that from the tribunal's perspective is *proven* by the record, and not merely supported by "some evidence." If the courts apply the "some evidence" rule without due modesty in cases truly involving a specialized expertise beyond their comprehension, then the likelihood of such erroneous reversals might be significant. Otherwise, I would suggest once more that the "some evidence" standard leaves so much room for honest tribunal error in matters that do not turn on arcane knowledge that such erroneous reversals should be very rare.

(2.4.5) Nonetheless, if the availability of "some evidence" review significantly increases the tribunal's experience of judicial review,

385. *Greenholtz*, 442 U.S. at 13; *Ingraham v. Wright*, 430 U.S. 651, 680-81 (1977); see also *Goldberg v. Kelly*, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting).

386. See, e.g., P. SCHUCK, *supra* note 379, at 74; Simon, *Legitimacy, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1201-06 (1983) (suggesting this happened in response to the *Goldberg v. Kelly* reform); cf. J. MASHAW, *BUREAUCRATIC JUSTICE* 160, 177 (1983) (state agencies' retreat to objective standards in response to federal administrative review system).

387. See, e.g., Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 548, 573 (1979).

there may be a danger of overdeterrence out of proportion to the likelihood of reversal. There has been much debate in recent years over official immunity for constitutional torts, but the extent to which civil liability does induce disproportionate government caution is not well understood.³⁸⁸ Common sense and simple models of bureaucratic behavior support concerns about overdeterrence if personal liability is perceived as a serious prospect.³⁸⁹ Widespread provision of insurance, indemnification and legal representation, however, dilutes the personal threat, partly assimilating official liability to enterprise liability.³⁹⁰ Even without personal liability, challenges to government action impose personal costs on bureaucrats if they are held answerable by their superiors or if their work is disrupted by the time demands of litigation.³⁹¹ In terms of disruption, "some evidence" claims impose fairly low litigation costs on the official or tribunal when compared to many other kinds of constitutional claims, since the court will decide on the tribunal's record rather than affording discovery or an evidentiary hearing to establish new facts. Once more, recalling the incremental character of the balance demanded by *Eldridge*, it should be emphasized that if "some evidence" review is in addition to judicial review *already* available on other issues, the additional contribution to overdeterrence costs may not be great. If bureaucrats are precise calculators of expected values, then every increase in the frequency of judicial reversal should result in an increase in overdeterrence, but if their perceptions of personal risk are more coarsely calibrated, their overreaction might not increase substantially.

388. See, e.g., P. SCHUCK, *supra* note 379, at 69, 79 (1983) ("We do not know, and we are unlikely ever to learn, how often officials engage in self-protection and how much of this risk-minimizing behavior can fairly be attributed to fear of litigation.").

As mentioned previously, see *supra* note 369, many decisionmakers would enjoy only qualified immunity from damage actions predicated on "some evidence" violations. Even those who enjoy absolute immunity can be subject to attorney's fee awards in injunctive actions. *Pulliam v. Allen*, 466 U.S. 522 (1984).

389. See, e.g., P. SCHUCK, *supra* note 379, at 59-81; Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26-33 (Winter 1978); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950).

390. See Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 685-86 (1987); Kramer & Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 S. CT. REV. 249, 272-76 (1988); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-12 (1979).

391. Mashaw, *supra* note 389, at 23-24, 26; see *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

c. *Contribution to Accuracy*

(3.0) The next factor to be considered is the incremental contribution to increased accuracy that the availability of "some evidence" review would make. Again, it is important to distinguish between direct contributions to accuracy resulting from the courts' overturning of erroneous decisions under the "some evidence" test and indirect contributions to accuracy resulting from any improvement in the tribunal's decisionmaking process in response to the availability of "some evidence" review.

(3.1.1) The magnitude of the direct contributions depends on the likelihood that the tribunal will make erroneous decisions, and that the court will catch such decisions on "some evidence" review that it would not have caught under any other form of judicial review (if any) available. Earlier, I discussed in qualitative terms the need for "some evidence" review in light of such factors as bias, combination of functions, other policy pressures on administrative decisions, and pressures for decisions to be made in haste. I also discussed some of the reasons why courts may be unable or unwilling to require elimination of the causes that impair impartial decisionmaking. These factors are directly relevant here. Unpopular minorities may be vulnerable to bias in nearly any decisionmaking structure. On the other hand, the likelihood of other pressures on impartiality will vary according to the nature of the deciding institution — its operational structure, its caseload, ongoing policy crises, and so forth. Thus, the direct contributions of "some evidence" review to accuracy should increase with the presence of warning factors, some involving the circumstances of the individual, and some involving characteristics of the tribunal.³⁹²

(3.1.2) Similarly, any existing barriers to open correction of the influences that prevent impartial decisionmaking would increase the likely contributions of "some evidence" review to improved accuracy. We are evaluating the incremental benefits of "some evidence" review, but even if other forms of judicial review are available in theory, they may be ineffectual in practice. The more the tribunal's decisionmaking processes are shielded from discovery or other public scrutiny, and the more they are fortified by presumptions of regularity, the more likely it becomes that "some evidence" review of the record will turn up otherwise undetectable denials of fair hearing.

(3.1.3) Internal review procedures that change particular out-

392. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 339, 416-17 (1973) (combination of functions leads agencies to underestimate cost of erroneous convictions, and "provides a strong argument for affording defendants in administrative proceedings a right of judicial review of the agency's factfindings").

comes³⁹³ may increase the chance that errors will be corrected without resort to judicial review, but only if the reviewer is free from the influences that cause the error in the first place.³⁹⁴ Even if internal review does not provide for correction of individual outcomes, it may indirectly decrease the likelihood that errors will arise from idiosyncratic biases of lower-level decisionmakers. Thus, truly effective alternative methods of quality control may make errors less likely, and may decrease the contribution of "some evidence" review to accuracy.³⁹⁵

(3.2) With regard to indirect contributions, we return once more to the degree to which judicial review creates incentives for more cautious decisionmaking. Common sense and simple models suggest that fear of reversal should prompt the adoption of more accurate decisionmaking techniques.³⁹⁶ But the paucity of data germane to the issue of *overdeterrence* also leaves uncertain the argument for beneficial deterrence. We do not really know, except anecdotally, how credible the threat of judicial review is in assuring procedural regularity. Some have found agencies responsive to the prospect of judicial review;³⁹⁷ others have found little evidence that fear of reversal improves the overall quality of adjudication.³⁹⁸ Also, the very fact of judicial review may increase public knowledge of the workings of the tribunal, which may in turn produce external or internal pressures for reform.³⁹⁹

393. Not all do. See *supra* note 306 and accompanying text.

394. See *supra* note 306 and accompanying text.

395. Mashaw, *supra* note 247.

396. See Shepsle, *Official Errors and Official Liability*, 42 LAW & CONTEMP. PROBS. 35, 43 (Winter 1978).

397. See, e.g., Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 295-97 (1987) (National Highway Traffic Safety Administration rulemaking procedures tightened in anticipation of strict judicial review); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975) (close judicial scrutiny of agency reasoning gives those inside the agency "who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not."); Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1045-46 (1980) (bias reversals have led to "careful internal reviews" of agency publicity).

398. See, e.g., J. MASHAW, *supra* note 304, at 139-40. (Administrative Law Judges apparently unconcerned with prospects of court reversal, except in cases specifically perceived as "court-bound").

399. J. MASHAW, *supra* note 304, at 137.

d. Conclusion

(4.1) The foregoing discussion has necessarily been too general, as it has not concentrated on the effects of “some evidence” review in a single fully specified government program. Nonetheless, it has identified some factors that should increase the benefits or costs of “some evidence” review in particular situations, most prominently the following: (1) The likelihood of increasing positive errors through “some evidence” review should be quite small, unless courts fail to respond deferentially to decisions based on specialized knowledge so much beyond their comprehension that they cannot recognize “some evidence” when they see it. (2) As usual in *Eldridge* analyses, the greater the stake of the individual, the greater the benefit. (3) It is hard to draw any systematic conclusion from the importance of the government’s regulatory interest; since “some evidence” review tends to improve accuracy, this factor is likely to cut both ways. (4) If other forms of administrative or judicial review are available *and effective*, the likely benefits of “some evidence” review will decrease. (5) Compared to certain other forms of judicial review, “some evidence” review will often be more effective and less disruptive; if judicial review is already available on other issues, the incremental costs of permitting “some evidence” review may be small (unless it greatly increases the frequency of judicial review). (6) The benefits of “some evidence” review are likely to be greatest when characteristics of the individual point to dangers of bias, or characteristics of the tribunal point to dangers of bias (especially systematic bias) or haste.

(4.2) Jerry Mashaw has argued that serious implementation of the *Eldridge* cost-benefit approach is hamstrung by its “enormous appetite for data that is disputable, unknown, and, sometimes, unknowable.”⁴⁰⁰ My difficulty in coming to a conclusion here should therefore not be surprising. I would emphasize that because it proceeds on the face of the record, “some evidence” review imposes relatively low litigation costs, and because it is so deferential, it tends very strongly to increase accuracy (outside the domain of arcane specialized knowledge). To me, this strongly suggests that the benefits of rectifying miscarriages of justice through “some evidence” review will often outweigh the costs, unless the private stake is regarded as de minimis. If so, an orthodox accuracy analysis supports this long-established rule.

2. “Some Kind of Balancing”

Without leaving the cost-benefit frame of mind suggested by *Eldridge* and economic thinking, I would like to add a further refine-

400. J. MASHAW, *supra* note 335, at 115.

ment to the argument, which weighs decisively in favor of "some evidence" review. In calculating "administrative costs" thus far, I have factored in on the government's side a number of costs traced from the tribunal's reaction to the court's intrusion. Supreme Court practice sanctions this, and comprehensive cost-benefit accounting supports it. I have not yet, however, offset against these costs the disutilities that would arise from the *public's* reaction to the court's *refusal* to intrude. I have reserved those until now because the Supreme Court's *Eldridge* analyses have always evaluated the private interest in terms of the utility of a favorable outcome, leaving aside utilities generated by the process itself. The Court's treatment of the individual and the government have been asymmetrical in this respect.

Jerry Mashaw has pointed out that the social disutility of an erroneous decision should depend not only on the direction of the error, but also on its magnitude⁴⁰¹ and possibly its *cause*.⁴⁰² A ten percent error rate in determining eligibility becomes much more disturbing when we recognize that its cause is race prejudice; the administration of the program not only is inaccurate and unfair, but also contributes to systematic racial oppression. If instead a tribunal's error rate reflects the biasing effect of its zealous performance of coordinate prosecutorial functions, or the fact that the tribunal is too busy to pay attention to the evidence presented before it, then it still raises concerns of unfairness as well as inaccuracy. The perception that the tribunal discounts or utterly ignores litigants' input adds an insult of unfairness to the injury of inaccuracy, and may substantially increase social disutility. Indeed, such experiences may make individuals or groups recoil against government as a whole.

Of course, there is nothing new in these observations. They simply translate into utility jargon the conventional wisdom that "justice must satisfy the appearance of justice,"⁴⁰³ and that due process serves in part as a means "for generating the feeling, so important to a popular government, that justice has been done."⁴⁰⁴ While these

401. For example, erroneously terminating disability benefits of a profoundly disabled person would impose greater social costs than erroneously terminating benefits of one who was just marginally eligible. Mashaw, *supra* note 306, 825-27.

402. *Id.* at 828, 830 ("Arguably, a general 'demoralization cost' should be added . . . to reflect society's disappointment or anxiety when confronted with the system's apparent inability to make consistent determinations.").

403. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

404. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). *See also* *United States v. Nixon*, 418 U.S. 683, 709 (1974) (compulsory process against President justified by need for public confidence in criminal

sentiments have been reiterated in the Court's post-*Eldridge* impartiality cases,⁴⁰⁵ treating them as entitled to serious weight is obviously in tension with *Eldridge*'s emphasis on *accuracy* as the touchstone of due process.⁴⁰⁶ An economist would not be unwilling to recognize, however, that people systematically derive utility from participating in decisions that affect them.⁴⁰⁷ An economist could also agree that the perceived unfairness of adjudicative procedures could result in serious "demoralization costs" for society, which can include not only the subjective unhappiness of the immediately affected individuals, but also distortions in other individuals' behavior motivated by fear of experiencing similar injustice, and disruptive, antisocial actions.⁴⁰⁸ Thus, even in economic terms, a procedure which achieves greater overall accuracy by diminishing participation may impose a substantial net social cost.

Including these costs in the cost-benefit balance is not the same as giving "process values"⁴⁰⁹ the due recognition that commentators have urged. Most writers who emphasize process values ascribe direct normative force to them, rather than contending that they generate utility that should not be overlooked in a utilitarian calculus.⁴¹⁰

justice).

405. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987) (plurality opinion); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Schweiker v. McClure*, 456 U.S. 188, 195-96 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); but see *Hortonville Joint School Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976). See also *Carey v. Phipps*, 435 U.S. 247, 261-64 (1978) (permitting compensatory damages for distress caused by unfair procedures, even where outcome was correct).

406. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("procedural due process rules are shaped by the risk of error inherent in the truthfinding process"); *Dixon v. Love*, 431 U.S. 105, 114 (1977); *Carey v. Phipps*, 435 U.S. 247, 259 (1978); *Parham v. J.R.*, 442 U.S. 584, 606-07, 612-13 (1979); *Mackey v. Montrym*, 443 U.S. 1, 13-14 (1979); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1980); *Allen v. Illinois*, 478 U.S. 364, 374-75 (1986).

407. See, e.g., Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 553 (1978); Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CALIF. L. REV. 116, 147-48 (1973).

408. See G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 132-34, 144-45 (1978) ("process costs" include frustration, depersonalization, anomie, and making society "appear contemptible"); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-17 (1967) (discussing "demoralization costs"); Williamson, *Administrative Decision Making and Pricing: Externality and Compensation Analysis Applied*, in THE ANALYSIS OF PUBLIC OUTPUT 115, 119-20 (J. Margolis ed. 1970) (discussing "demoralization costs"); see also Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1808-17 (1986) (undersupplying civil and criminal justice induces violent self-help, as illustrated by Bernhard Goetz case).

409. See, e.g., Summers, *supra* note 271, at 3 ("I use the phrase 'process values' to refer to standards of value by which we may judge a legal process to be good as a process, apart from . . . its capacity to yield good results") (emphasis in original).

410. See, e.g., J. MASHAW, *supra* note 335, at 182-83; L. TRIBE, *supra* note 272, at 502-03, 539-43; Michelman, *supra* note 270, at 126; Saphire, *supra* note 272, at 117-19;

But even if it parodies these higher Process Values, an approach that takes notice of their utility consequences is a technical improvement on models driven solely by a focus on the "accuracy" characteristics of procedures.

"Some evidence" review does not directly improve the behavior of the original tribunal, but it guarantees that in extreme cases of bureaucratic misconduct, the courts will provide a remedy, mitigating the disutility of abusive government action. If the legal system affords no remedy for clear cases of unfairness, then the demoralization costs may become even greater as dissatisfaction is transferred from the offending tribunal to the constitutional system as a whole. To the extent that courts increase the legitimacy of administrative government by rectifying its abuses, they also preserve their own legitimacy; to the extent that the federal courts rectify injustices inflicted by the states, they justify faith in the Nation. A court that refuses the remedy may prefer to disavow responsibility for the consequences, and attribute them to unavoidable constitutional constraints. But the court cannot lay the blame on others until after it has ascertained what the Constitution mandates. If the content of due process is to be specified by weighing "costs" and "benefits," then avoidance of these demoralization costs must also be weighed in the balance as a benefit of "some evidence" review.

Thus, the argument for the cost-justification of "some evidence" review is strengthened by focusing more closely on the particular *kinds* of error that it helps to eliminate. Errors attributable to evident unfairness are peculiarly distressing, demoralizing, and even destabilizing. They impose increasing costs the longer they persist. Even from a utilitarian perspective, the availability of judicial review to rectify such errors is essential.

V. APPLICATIONS

The foregoing considerations suggest that the constitutional requirement of "some evidence" has very broad application. There appears to be no basis, either in history or in reason, for limiting it to government action that would deprive an individual of an "important liberty interest," or indeed to confine it to deprivations of liberty at all. The traditional qualitative due process analysis suggests that the dangers against which "some evidence" review protects may materialize in any adjudicative system, even though certain characteristics

Summers, *supra* note 271, at 1.

of the threatened individual or of the caseload or structure of the adjudicative system may intensify their likelihood. The justification for "some evidence" review would appear to apply whenever due process requires a decision to be made impartially and to be based on an identifiable "record." The alternative economically-oriented cost-benefit analysis indicates that various factors, including the social value placed on a correct decision, increase the cost-effectiveness of "some evidence" review, but that the categorization of the affected interest as "liberty" or "property" is not determinative.

Under current law in most areas of federal administration, "some evidence" review is unnecessary, because the federal APA already affords review under the substantial evidence test or the arbitrary-and-capricious test,⁴¹¹ either of which is more intrusive than "some evidence" review. In these areas, then, the due process "some evidence" requirement rests in the background as a minimum floor of review independent of statutory authorization. The more immediate practical consequences of the analysis pursued in this article, therefore, lie in areas not covered by the federal APA — certain exceptional federal programs, and state administration. In this Part, I will briefly discuss two federal examples: the implications of the "some evidence" requirement for the permissible scope of preclusion of judicial review in federal benefit programs and the interaction of the "some evidence" requirement with the emerging trend toward compulsory arbitration of claims within a federal administrative program.

"Some evidence" review with regard to state administrative agencies requires less discussion here, I think, in light of 42 U.S.C. section 1983, which provides express congressional authorization for judicial redress of due process deprivations under color of state law. "Some evidence" challenges would be governed by the generally applicable principles of section 1983 litigation. Depending on the status of the defendant and the requested remedy, the plaintiff may face problems of eleventh amendment immunity, or the absolute or qualified immunity of public officials. Depending on the procedural posture of the case, the plaintiff may face problems of res judicata or abstention. But I am aware of no respect in which a section 1983 suit based on "some evidence" principles would differ, for example, from a section 1983 suit based on direct allegations of bias.⁴¹²

411. 5 U.S.C. §§ 706(2)(E), 706(2)(A) (1982); see *Association of Data Processing Service Org. v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) ("in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.").

412. The defendant also may raise a defense under the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), as in a bias case, claiming that a sufficient remedy is available in state court. Although some lower federal courts have been receptive to such claims, I believe that such examples stretch *Parratt* to the breaking point. See *supra* note 326;

A. Preclusion of Judicial Review in Benefit Programs

Recognition of "some evidence" as a constitutional requirement increases the difficulty of the traditional crux concerning Congress' power to preclude judicial review of federal administrative action. While Congress need not vest full powers of APA review over all administrative action, the particularly troubling example that concerns us here involves review of violations of constitutional right in the course of a hearing required by due process. In recent years, the leading battleground for that debate was 38 U.S.C. section 211(a), which precluded judicial review of benefits decisions of the Veterans' Administration (VA).⁴¹³ The extent to which this statute should be

Neuman, *supra* note 326 (forthcoming).

413.

[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a)(1982).

See generally Traynor v. Turnage, 108 S. Ct. 1372 (1988); Johnson v. Robison, 415 U.S. 361 (1974); Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964); Morris, *Judicial Review of Non-Reviewable Administrative Action: Veterans Administration Benefit Claims*, 29 ADMIN. L. REV. 65 (1977); Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975); Note, *The Case for Judicial Review of Veterans' Administrative Benefit Determinations*, 2 ADMIN. L. J. 217, 238 (1988).

While this article was going to press, years of legislative effort bore fruit in the enactment of a statute permitting some judicial review of veterans benefit decisions. See Veterans' Judicial Review and Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105. The statute provides a first tier of review in a newly-created legislative court to be known as the "United States Court of Veterans Appeals," and a second tier of judicial review in the United States Court of Appeals for the Federal Circuit, an Article III court. *Id.* § 301, 102 Stat. 4113, 4120 (to be codified at 38 U.S.C. §§ 4051, 4052, 4092). The statutory provisions regarding judicial review of factual determinations are somewhat conflicting. Section 4092(a) contemplates review of decisions of the legislative court "with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 355 of this title) or any interpretation thereof (other than a determination as to a factual matter) . . ." 102 Stat. 4020. Section 4092(d)(2), however, provides: "Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 102 Stat. 4121. The joint explanatory statement of the conference committee observes that "(except where a challenge is based on Constitutional grounds) the CAFC would not have jurisdiction to review a challenge to a regulation as applied, but only a challenge to a regulation on its face." 134 Cong. Rec. S16657 (Oct. 18, 1988). It would thus appear that, in light of the analysis pursued in this article, the statute should be construed as authorizing "some evidence" review in the Federal Circuit, as well as the review provided in the legislative court.

interpreted as depriving federal courts of the authority to review unconstitutional action of the VA, and the extent to which the statute itself was constitutional if so interpreted, remain open questions. Suppose, for example, that a female veteran charged that her claim for benefits had been rejected because of the gender bias of the VA adjudicators, and in addition, that the decision did not have "some evidence" to support it. Could the preclusion statute validly deny her a judicial forum in which to raise these claims and seek invalidation of the decision? Similar questions may arise in other federal benefit programs, such as "Part B" of the Medicare statute, which also appears to preclude judicial review of certain benefits decisions.⁴¹⁴ Narrow interpretation of preclusion provisions is, of course, a venerable tradition in administrative law⁴¹⁵ — indeed, we have seen how "some evidence" review emerged from Justice Holmes's narrowing of a finality provision in *Chin Yow v. United States*.⁴¹⁶

In view of the difficulty of the constitutional issue that would otherwise arise, the Supreme Court in *Johnson v. Robison*⁴¹⁷ construed the veterans benefit statute as not precluding a challenge to the constitutionality of statutory eligibility requirements. The Court identified two purposes of the preclusive provision: to protect the federal courts and the agency against a flood of litigation, and to avoid inept judicial interference with matters best understood by the VA.⁴¹⁸ It found that reviewing the constitutionality of statutory provisions on eligibility would not disserve those purposes, and that the language of the preclusion could be construed as regarding these as "decisions of Congress" rather than "decisions of the Administrator."⁴¹⁹ Similarly, in *Walters v. National Association of Radiation Survivors*, the Court construed the statute as permitting a facial challenge to procedural provisions of the statute that allegedly denied due process, noting that "the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims systems."⁴²⁰

414. See *United States v. Erika, Inc.*, 456 U.S. 201 (1982). See also 5 U.S.C. § 8128(b) (unreviewability of federal employee compensation benefits); *Rodrigues v. Donovan*, 769 F.2d 1344 (9th Cir. 1985) (section 8128 does not preclude procedural due process claim); 10 U.S.C. § 2735 (1982) (preclusion of review under Military Claims Act); *Poindexter v. United States*, 777 F.2d 231 (5th Cir. 1985) (where only constitutional claim is frivolous, section 2735 precludes review); 5 U.S.C. § 8347(c) (precluding review of civil service disability decisions); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985) (section 8347 bars review of factfinding, but not of errors "going to the heart of the administrative determination").

415. See, e.g., L. JAFFE, *supra* note 50, at 353-57.

416. 208 U.S. 8(1908). See *supra* text accompanying notes 29-39.

417. 415 U.S. 361 (1974).

418. *Id.* at 370.

419. *Id.* at 367.

420. 473 U.S. 305, 311, n.3 (1985). It probably would be taking unfair advantage of inadvertently generous wording to construe this footnote as settling that the statute did

The lower courts have differed greatly on the leeway for review of veterans benefits decisions that this approach affords. Several courts have held that the statute did not preclude review of VA regulations or other across-the-board practices, as it was illogical to assume that Congress would shield administrative rules more thoroughly than statutory ones, and one-shot review of a regulation burdens the courts far less than case-by-case review of individual adjudications.⁴²¹ Some courts have reviewed the constitutionality of VA procedures,⁴²² even in individual cases,⁴²³ but others have refused,⁴²⁴ or have dismissed particular constitutional claims as merely colorable vehicles for seeking APA review.⁴²⁵ One court has specifically held that a claim that the VA violated due process by making findings in the face of the plaintiff's un rebutted testimony was precluded from review.⁴²⁶

More recently, in *Traynor v. Turnage*,⁴²⁷ the Supreme Court held that the preclusion provision did not bar review of whether VA regulations violated the Rehabilitation Act⁴²⁸ or other statutes of general application.⁴²⁹ *Traynor* went significantly beyond *Johnson v. Robi-*

not purport to preclude "some evidence" review.

421. See *Kirkhuff v. Nimmo*, 683 F.2d 544 (D.C. Cir. 1982); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980); *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980); *Merged Area X (Education), Etc. v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State Univ. v. Cleland*, 590 F.2d 627 (6th Cir. 1978); *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975); but see *Roberts v. Walters*, 792 F.2d 1109 (Fed. Cir. 1986) (regulations may be challenged as unconstitutional, but not as exceeding statutory authority); *Gott v. Walters*, 756 F.2d 902, 912 n.10 (D.C. Cir.), *vacated for reh'g en banc*, 791 F.2d 172 (D.C. Cir.), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985).

422. *Devine*, 616 F.2d 1080; *Plato*, 397 F. Supp. 1295.

423. *Mathes v. Hornbarger*, 821 F.2d 439 (7th Cir. 1987); *Arnolds v. Veterans' Admin.*, 507 F. Supp. 128 (N.D. Ill. 1981).

424. *Higgins v. Kelley*, 824 F.2d 690 (8th Cir. 1987); *Moore v. Johnson*, 582 F.2d 1228 (9th Cir. 1978); *Anderson v. Veterans Admin.*, 559 F.2d 935 (5th Cir. 1977).

425. *Dyer v. Walters*, 646 F. Supp. 791 (E.D. Mo. 1986); *Cabiya San Miguel v. United States Veterans' Adm'r*, 592 F. Supp. 21 (D.P.R. 1984), *aff'd*, 774 F.2d 1148 (1st Cir. 1985).

426. *Brooks v. Cleland*, 531 F. Supp. 103 (E.D. Mich. 1982). Of course, *nonconstitutional* sufficiency of the evidence claims are within the preclusion provision; they are indeed the leading example. *Carter v. Cleland*, 643 F.2d 1, 9 (D.C. Cir. 1980). Judicial review of such claims in Article III courts is still precluded under new legislation. See *supra* note 413.

427. 108 S. Ct. 1372 (1988).

428. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

429. 108 S. Ct. at 1378-80. All Justices participating in the decision joined in this holding, but Justice Scalia, while a Circuit Judge, had expressed a contrary view in one of the cases under review. See *McKelvey v. Turnage*, 792 F.2d 194, 209-10 (D.C. Cir. 1986) (Scalia, J., dissenting), *aff'd*, 108 S. Ct. 1372 (1988). Neither he nor Justice Kennedy took part in the decision. 108 S. Ct. at 1384.

son and *Radiation Survivors* by permitting review of a regulation issued by the VA in the exercise of its discretion, rather than an action compelled by a congressional statute. The Court noted the strong presumption in favor of judicial review.⁴³⁰ It denied that the VA had “any special expertise in assessing the validity of its regulations . . . under a later-passed statute of general application.”⁴³¹ And the Court found no reason to believe that challenges to regulations would occur frequently enough to impose an undue burden on the courts.⁴³²

Recognizing fact-specific “some evidence” claims as procedural due process challenges to benefits administration poses in stark form the issues raised by preclusion of judicial review. Like other nonsystematic procedural due process claims (if not more so), “some evidence” claims do not facilitate “wholesale” judicial correction of administrative malfunction, but rather afford “retail,” case-by-case remediation of individual violations of constitutional rights. As discussed previously, claims of violations, and even meritorious claims of violations, may be raised with sufficient frequency to impose a quantitative “burden” on the courts.⁴³³ Moreover, this “retail” character may create a risk of imposing litigation costs that far exceed the amount of veterans benefits at issue.

If the constitutionality of precluding “some evidence” review in federal benefits programs is simply a due process question governed by the *Mathews v. Eldridge* balancing approach,⁴³⁴ then the question has already been discussed. Part IV(B) above considered cost-benefit analysis of a constitutional right to judicial review. I observed there that the cost-effectiveness of “some evidence” review turned in part on the magnitude of the private interest at stake, the likelihood that courts would mangle esthetic issues, the effectiveness of other available controls, the likelihood of bias or haste, and the potential for disrupting delicate relationships. With appropriate empirical as-

430. 108 S. Ct. at 1378.

431. *Id.* at 1379. That observation deserves some qualification; while the VA may have no special expertise with regard to the principles or policies of a general statute, it may well have particularized knowledge of how those principles or policies interact with the realities of administering veterans’ benefits. See *Gott v. Walters*, 756 F.2d 902, 910 (D.C. Cir.) (Scalia, J.), *vacated and reh’g granted*, 791 F.2d 172 (D.C. Cir.), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985). Nonetheless the Court permitted review.

432. 108 S. Ct. at 1379, n.9. The Court did not directly address the preclusion of challenges to VA regulations for violation of the APA or inconsistency with veterans benefit statutes.

433. See *supra* notes 376-78 and accompanying text. “Some evidence” claims do not, however, generally raise the spectre of undue interference with administrative expertise, another goal served by preclusion of review; the “some evidence” standard is too deferential for that. See *supra* text accompanying notes 367-69; Rabin, *supra* note 413, at 922.

434. See *supra* text accompanying notes 349-54.

sumptions, the cost-benefit approach could accommodate the instinct that it is absurd to spend vastly more on judicial review of an individual case than the case is "worth" if the injured party wins. Opponents of judicial review have argued that it would override superior VA expertise and disrupt veterans' relations with a benevolent, fatherly service bureaucracy.⁴³⁵ On the other hand, alternative assumptions about such matters as the ineffectiveness of internal "quality control" and the degree to which judicial review in individual cases generates positive externalities by exposing and deterring abuses could lead to a contrary conclusion;⁴³⁶ and indeed recent disclosures about the operation of the VA claims process suggest that a substantial degree of lawlessness has flourished in the darkness.⁴³⁷ I also suggested that an appropriate estimate of the "benefits" would recognize that a "some evidence" case founded on intimations of invidious discrimination may be "worth" much more than the price of the entitlement at issue.⁴³⁸ Thus, even from a cost-benefit perspective, requiring that the floodgates be nudged open enough to permit constitutional "some evidence" review might make excellent sense.

If, as I believe, cost-benefit analysis is not determinative of the right to judicial review, then the debate must embrace other modes of analysis and further considerations not commensurable with quantified cost and benefit factors. A voluminous literature discusses these questions, and I will only allude to a few points here. For example, on the government's side, as Justice Scalia has pointed out, benefits payments to be paid from the Treasury are within the scope of historical notions of the sovereign's immunity from unconsented suit.⁴³⁹ Moreover, to the extent that VA decisions depend on a law of

435. See, e.g., *H.R. 585 and Other Bills Relating to Judicial Review of Veterans Claims: Hearings before the House Comm. on Veterans Affairs*, Vol. I, 99th Cong., 2d Sess. 90-91 (1986) (testimony of Rep. Solomon); *id.* at vol. II, 67-69 (testimony of VA Gen. Counsel Ivers); *id.* at 28 (testimony of Prof. Mashaw). One may doubt, however, these professions of expertise, and wonder whether the system merely carries over into civilian life enforced dependence on a military hierarchy.

436. Cf. Rabin, *supra* note 413 (emphasizing "deterrent effect of judicial review").

437. See *supra* note 302.

438. See *supra* text accompanying notes 401-10.

439. *Gott v. Walters*, 756 F.2d 902, 912 n.10 (D.C. Cir.), *vacated for reh'g en banc* 791 F.2d 172 (D.C. Cir.), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985); see also *Webster v. Doe*, 108 S. Ct. 2047 (1988) (Scalia, J., dissenting) ("The doctrine of sovereign immunity . . . is a monument to the principle that some constitutional claims can go unheard."); cf. *Bartlett ex rel. Neuman v. Bowen*, 816 F.2d 695, 711 (D.C. Cir. 1987) (Bork, J., dissenting) (no relation) (Congress may even preclude judicial review of constitutionality of benefit legislation itself), *order for reh'g en banc vacated*, 824 F.2d 1240 (D.C. Cir. 1987).

military service-relatedness and military mores, insulating VA legal determinations from review furthers that segregation of the military sphere from the civilian courts that emerged as a fortissimo opening theme of the Rehnquist Court period.⁴⁴⁰ On the other hand, the VA is not part of the military command structure or the military justice system, but rather a civilian agency, exercising authority over *former* service personnel and their families. The notion that Congress can empower executive officials to violate constitutional rights by cutting off all forms of redress runs violently counter to our constitutional traditions.⁴⁴¹ Moreover, statutory benefits are "property entitlements" within the meaning of the Court's recent due process approach, and the very positivism that permeates that approach undermines any claim that there is a profound gulf between "new" property and "old." The Court has utterly rejected, with only a single dissenting voice, the notion that legislatures have final power to decide the procedures by which "new" property rights will be protected.⁴⁴² The Court's most recent decisions on impermissible vesting of Article III power have also discredited the archaic public rights/private rights distinction that once justified lesser judicial responsibility for assuring lawful resolution of disputes between individuals and the Executive.⁴⁴³ And it has found sovereign immunity no bar to the self-executing character of the constitutional prohibition against takings of property without just compensation.⁴⁴⁴

Actually, it would not be necessary to reach this jurisprudential Armageddon, if section 211(a) were reasonably susceptible of an interpretation that permitted procedural due process challenges to individual benefits decisions. Although the Supreme Court has spoken of the statute as precluding review of "decisions made in interpreting or applying a particular provision of [a veterans benefit] statute to a particular set of facts,"⁴⁴⁵ the Court's attention was not focused on such challenges arising under the Constitution. The VA is no more vested with expertise in constitutional matters than it is in matters

440. See *Solorio v. United States*, 107 S. Ct. 2924 (1987), *overruling*, *O'Callahan v. Parker*, 395 U.S. 258 (1969); *United States v. Stanley*, 107 S. Ct. 3054 (1987); *United States v. Johnson*, 481 U.S. 681 (1987).

441. See, e.g., *United States v. Mendoza-Lopez*, 107 S. Ct. 2148 (1987) (prohibiting Congress from using criminal sanctions to give effect to an unreviewable executive decision even where the executive, not Congress, is responsible for cutting off the individual's right to review); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936).

442. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985). The dissenting voice is, of course, that of the current Chief Justice.

443. See *supra* note 77.

444. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2386, n.9 (1987) (Rehnquist, C.J.).

445. *Traynor v. Turnage*, 108 S. Ct. 1372, 1379 (1988); *Johnson v. Robinson*, 415 U.S. 361, 367 (1974).

arising under the Rehabilitation Act, and the presumption of reviewability of constitutional questions is particularly strong. A reconciling precedent is available in the interpretive behavior of Justice Holmes himself, a jurist unafraid of harsh answers to hard questions, in *Chin Yow v. United States*.⁴⁴⁶ Confronted with a statute providing that "the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury,"⁴⁴⁷ Justice Holmes concluded that "The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form."⁴⁴⁸ In neither the immigration case nor in the veterans benefit situation is there reason to believe that Congress intended to shield utterly lawless dispositions from review.⁴⁴⁹ Thus, just as the Court has upheld review of VA decisions resting on statutes or regulations whose validity is challenged on grounds beyond the VA's expertise, so it could be recognized that a purported decision founded on such a denial of the right to be heard as to violate the "some evidence" requirement did not amount to a "decision . . . on any question of law or fact" as to which Congress intended to bar judicial review."⁴⁵⁰

B. *The Move to Arbitration*

A controversial trend in the legal system in recent years has been the enthusiastic promotion of "Alternative Dispute Resolution" or "ADR" as a means of relieving pressure on overworked tribunals and providing swifter and cheaper justice. This trend has recently spread to federal administrative agencies, themselves an earlier generation's method of alternative dispute resolution. Ironically enough, executive tribunals that justified taking adjudicative business away from the federal courts on the theory of superior administrative ex-

446. 208 U.S. 8 (1908). The Court's opinion in *Chin Yow* was unanimous, except that Justice Brewer, who regarded much of the anti-Chinese legislation as unconstitutional, concurred only in the judgment.

447. Enforcement of the Chinese Exclusion Act, ch. 301, 28 Stat. 390 (1894).

448. 208 U.S. at 12.

449. See *Johnson*, 415 U.S. at 361, 368-73 (noting congressional concern to preserve administrative expertise and uniformity from judicial disruption). See also *Estep v. United States*, 327 U.S. 114, 117-20 (1946) (finality of "decisions" of draft boards "within their respective jurisdictions" excludes "lawless" action and violations of some evidence requirement).

450. A somewhat easier argument suggests the absence of a clearly expressed congressional intent to preclude review of constitutional issues under the new veterans benefits legislation. See *supra* note 413.

pertise are now attempting to divest themselves of unwanted caseloads by handing them on to arbitrators. Of course, the interrelations between administration and arbitration are varied and complex. For example, Congress itself has sometimes required arbitration as an adjunct to an administrative program.⁴⁵¹ In other cases agencies have acted under general grants of rulemaking authority.⁴⁵² Arbitration may merely be "encouraged" or it may be compulsory.⁴⁵³ And an arbitrated dispute may be between an agency and a private party or between two private parties.⁴⁵⁴ These matters deserve closer attention than I have time or space for here. The Administrative Conference of the United States has been promoting the use of alternative methods of resolving disputes in both rulemaking and adjudication, and has recently issued a Sourcebook containing recommendations, factual information, and analyses of some of the issues involved.⁴⁵⁵

The term "arbitration" covers a variety of dispute-resolving structures, but the attractions of arbitration often involve the following characteristics: (1) the parties to the arbitration have voluntarily chosen it as the means of resolving their dispute; (2) the parties have agreed upon or had input into the selection of the arbitrator; (3) the procedure before the arbitrator is flexible, informal, and expeditious; (4) the arbitrator may be expressly or impliedly authorized to dispense an intuitive substantial justice rather than deciding the merits legalistically; (5) the arbitrator may be permitted to give little or no account of the reasons underlying the award, a circumstance which may facilitate intuitive substantial justice even where such justice is not expressly authorized; and (6) the procedural simplicity of arbi-

451. *E.g.*, 7 U.S.C. § 136a(c)(1)(D)(ii) (FIFRA arbitration, discussed *infra* text accompanying notes 457-61); 42 U.S.C. § 9612(b)(4) (1982) (Superfund claims arbitration); 29 U.S.C. § 1401 (1982) (ERISA withdrawal liability arbitration). The latter recently was upheld by an equally divided Court against the claim that statutory presumptions in the arbitration procedure biased the outcome in favor of pension plans and against contributing employers. *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd mem. sub nom. Pension Benefit Guaranty Corp. v. Yahn & McDonnell, Inc.*, 107 S. Ct. 2171 (1987); see Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 GEO. L.J. 161 (1982).

452. *E.g.*, 17 C.F.R. § 12.100-106 (1988) (Commodity Futures Trading Commission (CFTC) reparations procedure).

453. The CFTC example is a voluntary procedure; the FIFRA, Superfund, and ERISA examples are compulsory.

454. The CFTC, FIFRA, and ERISA examples concern disputes between private parties; the Superfund example concerns disputes against the government.

455. OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987) [hereinafter SOURCEBOOK]. See also, *e.g.*, *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987).

tration is reinforced by an exceedingly narrow scope of judicial review.⁴⁵⁶

The importation of arbitration into the context of federal administration can make available some or all of these advantageous characteristics. It may involve referral of a dispute between an individual and an agency to an impartial private expert by mutual consent. It may simply involve decisionmaking by an agency employee under conditions of extreme procedural informality. Alternatively, it may involve a mandatory program of farming out categories of disputes to private decisionmakers. An arbitral proceeding simultaneously involving characteristics (3), (4), (5) and (6) above contrasts quite strikingly with the customary features of due process adjudication, but these departures are usually considered justified by the *private* character of the arbitrator and the *voluntary* character of the submission. Within federal programs, however, both the public/private character of the arbitrator and the voluntariness of the submission can be quite problematic, even when the arbitration is superficially denominated as consensual.⁴⁵⁷

To begin an exploration of the issues germane to this article, however, it is enough to focus on the easy case of compulsory binding arbitration mandated by federal statute or regulation as the means of resolving a claim of entitlement to a liberty or (more likely) property interest. One prominent example was featured in the Supreme Court's decision in *Thomas v. Union Carbide Agricultural Products Corp.*⁴⁵⁸ Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), manufacturers who have registered pesticides must permit the government to use any proprietary information disclosed in the registration process for evaluation of other manufacturers' re-

456. See, e.g., Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L. J. 141, 152-55 (1987), also in SOURCEBOOK, *supra* note 455, at 309, 311-14.

457. See Bruff, *The Constitutionality of Arbitration in Federal Programs* (preliminary draft), reprinted in SOURCEBOOK, *supra* note 455, 961, 974-78 (1987). Bruff notes the equivocal nature of "consent" to arbitration when dealing with the government, aptly referring the reader to the unconstitutional conditions doctrine. *Id.* at 1036 (citing Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984)). Some older, intermediate points on the spectrum from voluntary arbitration to compulsory arbitration include traditional labor arbitration under the NLRA, where an employee's rights are determined by an arbitration agreed to by a statutorily recognized collective bargaining representative, and "minor dispute" resolution under the Railway Labor Act, where an arbitration system agreed to by labor and management groups was written permanently into the statute, see 45 U.S.C. §§ 151-64 (1982).

458. 473 U.S. 568 (1985).

gistrations. In return, they are given a right of compensation against any competitor benefited thereby, but Congress required private arbitration under the auspices of the Federal Mediation and Conciliation Service (FMCS) as the only forum for asserting the right. In *Thomas*, the Supreme Court upheld this program against a claim that Congress had vested federal judicial power in the arbitrator in violation of Article III. Although FIFRA limited judicial review to "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator," the Court observed that this language did not express an intent to preclude review of any "constitutional error" by the arbitrator.⁴⁵⁹

The "fraud, misrepresentation, or misconduct" standard of FIFRA corresponds to the traditional, restrictive standard of review also contained in the United States Arbitration Act.⁴⁶⁰ In fact, the Administrative Conference has specifically recommended limiting judicial review to the "limited scope-of-review provisions of the United States Arbitration Act, rather than the broader standards of the APA," in both voluntary and mandatory arbitration.⁴⁶¹ More recently, the Conference has even proposed eliminating judicial review of individual arbitration awards in certain government programs altogether.⁴⁶²

Serious dangers lurk here. Why should standards of review developed in the context of private consensual arbitration, and traditionally justified by reference to the parties' contractual undertaking, be sufficient for review in involuntary proceedings mandated by Congress or its delegate? When confronted by a new institutional development, courts, legislators or administrators may be comforted by finding a ready-made standard written out in the United States Code, particularly one designed for what is *nominally* the same pro-

459. *Id.* at 573-74 n.1, 592 (citing 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).

460. The Arbitration Act permits an award to be vacated:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the right of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (1982).

461. Administrative Conference of the United States (ACUS), Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, ¶ 4(f), 1 C.F.R. § 305.86-3, *reprinted in* SOURCEBOOK, *supra* note 455, at 113, 114-15.

462. ACUS, Proposed Recommendation, Assuring the Fairness and Acceptability of Arbitration in Federal Programs, ¶ 3(c), *reprinted in* SOURCEBOOK, *supra* note 455, at 403, 404.

cess. But that does not justify a refusal to recognize and confront the realities of the new situation.

The specific issue that concerns us here is review of arbitral factfinding, seeking the minimal evidentiary basis necessary to assure us of the impartiality and procedural integrity of the proceeding. Interestingly enough, the Administrative Conference's proposed criteria for identifying situations suitable for arbitration favor retaining administrative jurisdiction over cases raising precedential issues of law, and encourage arbitration of cases turning on issues of fact.⁴⁶³ While this distinction makes excellent sense in terms of furthering the agency's control of its delegated lawmaking authority, it precisely reverses the priority governing the strength of due process rights of participation.⁴⁶⁴ The proposal's choice of emphasis reinforces the concern that agency review as contemplated by the Administrative Conference would not serve the function that review by judges under the "some evidence" standard serves. As in other administrative quality control systems, agencies are likely to focus more on consistency of the outcome with current agency policy than on fairness to the party.⁴⁶⁵

The traditional scope of judicial review of voluntary arbitration does include scrutiny of impartiality and procedural regularity,⁴⁶⁶ but does not focus attention on the question of evidentiary support. Courts frequently repeat that partiality must be proved directly, and that parties cannot rest claims of partiality on speculation.⁴⁶⁷ Courts normally refuse to look at alleged discrepancies between an arbitrator's award and its evidentiary basis, arguing that the parties bargained for the arbitrator's judgment, and not the courts'.⁴⁶⁸ Some-

463. ACUS, Recommendation 86-3, ¶¶ 5, 8, 1 C.F.R. § 305.86-3, *reprinted in* SOURCEBOOK, *supra* note 455, at 113, 114-15; ACUS, Proposed Recommendation, Assuring the Fairness and Acceptability of Arbitration in Federal Programs, ¶ 1(a), *reprinted in* SOURCEBOOK, *supra* note 455, at 403, 404.

464. *See supra* text accompanying notes 269-75.

465. *See supra* text accompanying note 306.

466. 9 U.S.C. §§ 10(b), 10(c) (1982); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

467. *See, e.g., Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Sidarma Societa Italiana di Armamento SpA v. Holt Marine Indus.*, 515 F. Supp. 1302 (S.D.N.Y.), *aff'd mem.*, 681 F.2d 802 (2d Cir. 1981).

468. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 371 (1987) (party cannot challenge "improvident, even silly, factfinding"); *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963); *Newark Stereotypers' Union v. Newark Morning Ledger Co.*, 261 F. Supp. 832 (D.N.J. 1966); *O & G/O'Connell Joint Venture v. Chase Family Ltd. Partnership* No. 3, 203 Conn. 133, 523 A.2d 1271 (1987) (rejecting "thinly veiled attempt to have the award vacated on the ground that it was not supported by any evidence at the hear-

times courts will respond to extreme discrepancies, stretching rubrics of constructive fraud or the failure of an award to draw its essence from the collective bargaining agreement to cover such cases, often drawing criticism when they so respond.⁴⁶⁹ But there is no consistent tradition of "some evidence" review accompanying the "evident partiality" and "refusing to hear" criteria of the United States Arbitration Act.

If arbitration were inherently free of the pressures that call for "some evidence" review in the administrative context, then relegating victims of arbitral malfunction to direct proof of bias or irregularity might not be troubling. But the various strategies for structuring arbitration carry their own risks of impropriety. For example, in the arbitration of a dispute between an individual and a federal agency, the impartiality of an agency employee as arbitrator⁴⁷⁰ is no less compromised than in more formal administrative proceedings. Borrowing a "neutral" adjudicator from some other federal agency⁴⁷¹ does not guarantee impartiality: if the sister agency pursues an enforcement mission related to that of the agency party (which is the most likely explanation for the borrowed employee's possessing expertise relevant to the dispute), then its decisionmaking may be subject to many of the same defects as the original agency's.

The alternative of arbitration by private adjudicators chosen from a pool of qualified individuals on a fee-for-service basis⁴⁷² poses risks of its own. The relevant expertise may be found only in individuals who are allied with one side of a dispute. Since arbitration need not be a full-time profession, the conflict of interest may be even greater for arbitrators than for agency personnel subject to the "revolving door" phenomenon.⁴⁷³ Students of the economics of adjudication have suggested that a private adjudicator has an interest in developing a reputation for competence and impartiality, but that to the extent that some parties have a greater opportunity to select the

ing"); *Donegan v. Michigan Mutual Ins. Co.*, 151 Mich. App. 540, 391 N.W.2d 403 (1986); Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 682-85 (1950); but see *Larson v. Nygaard*, 148 Minn. 104, 180 N.W. 1002 (1921) (states Minnesota rule contemplating vacation if award "so at variance with any conclusion that could legitimately be drawn from the facts and evidence before them as to imply bad faith or a failure to exercise an honest judgment").

469. Note, *supra* note 468, at 685; Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 270-71 (1980).

470. See ACUS, Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, ¶ A(2,3,5), 1 C.F.R. § 305.86-8, *reprinted in* SOURCEBOOK, *supra* note 455, at 885, 887.

471. See *id.*

472. See *id.* Part B, *reprinted in* SOURCEBOOK, *supra* note 455, at 887-88.

473. See, e.g., *Developments in the Law — Conflict of Interest*, 94 HARV. L. REV. 1244, 1428-39 (1981); cf. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Blackmun, J., dissenting in part) (securities arbitrators too tied to securities industry).

decisionmaker, there is an incentive to favor those parties.⁴⁷⁴ If the pool is a restricted list of specialists, then these arbitrators may favor parties who will be involved repeatedly in similar disputes, such as the agency itself, or perhaps (if the dispute is between private parties) the regulated entity rather than the consumer of its goods or services. If instead private arbitrators are chosen from among a large pool of "generalists" who cannot expect a recurrence of similar cases, then they may have less incentive to invest time in the quality of their decisions. Thus, the Supreme Court's endorsement in *Thomas* of a neutral arbitrator chosen by the parties or the FMCS as producing "impartial decision-making, free from political influence,"⁴⁷⁵ may be a more accurate estimate of separation-of-powers dangers than of potential threats to due process impartiality.

The literature on ADR also suggests another danger in arbitration — that when confronted with poor or minority litigants, the informality of arbitral process gives excessive rein to the cognate quality of arbitrariness. "Informal justice" has been criticized as a second-class procedural system designed to deny the disadvantaged the full content of their formal substantive rights.⁴⁷⁶ There may be particular danger that informality frees arbitrators to indulge ethnic prejudice. Richard Delgado and a group of his students have argued that procedural formality provides a framework that induces decisionmakers to counteract their prejudices. This permits them to perceive the merits of a minority litigant's claims more accurately than a less structured process would.⁴⁷⁷ "[B]ased on what is known about human and contextual factors that contribute toward prejudiced behavior, ADR is indeed likely to increase the risk of that behavior."⁴⁷⁸

474. See Landes & Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 237 (1979); *id.* at 255 (judges compensated out of litigant fees would tend to favor party with forum choice); *cf.* P. HAYS, LABOR ARBITRATION — A DISSENTING VIEW 59-62, 112 (1966) (discussing arbitrator's incentives to make awards "acceptable" to party that might block future appointments); Farber & Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration*, 54 ECONOMETRICA 819, 822 (1986) (same).

475. 473 U.S. at 590.

476. *E.g.*, Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 297-99 (R. Abel ed. 1982); Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE at 119, 148-59; *cf.* J. AUERBACH, JUSTICE WITHOUT LAW 74 (1983) (mediation in Chinese immigrant community forestalled conflict with outsiders, but reinforced rule of merchant elite).

477. Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

478. *Id.* at 1361.

Thus, arbitration is not only not free of the dangers that called forth the "some evidence" requirement, but, in some respects, it may be more prone to them.

Requiring "some evidence" review in addition to permitting direct proof of partiality or misconduct would not necessarily destroy the legitimate advantages of ADR for federal administrative agencies. It would not prevent the agencies from calling on a flexible pool of non-employee decisionmakers. It would not undercut the claimed advantages of informality in the arbitral factfinding process, particularly if the Administrative Conference itself continues to recommend that arbitrators write brief summaries of the factual and legal bases of their awards (instead of indulging their traditional license to make decisions without giving reasons).⁴⁷⁹ It would decrease the ability of arbitrators to make swift, final decisions, but this is only a relative change when compared to any opportunity for agency review,⁴⁸⁰ and to judicial review under the United States Arbitration Act standard.⁴⁸¹

"Some evidence" review would also inhibit use of arbitration as a black box for achieving compromise outcomes that do not actually correspond to the legal positions of either party. But it is not clear that compelled compromise of entitlement claims can be considered a legitimate benefit of arbitration. Openly accommodating arbitral compromise as a mode of due process adjudication would require a major paradigm change for the Supreme Court and its accuracy approach, which values procedures as methods for correct determination of disputes according to existing legal rules. Chief Justice Rehnquist would probably have no trouble incorporating compromise of "new property" entitlements into his uncompromisingly positivist due process jurisprudence, since he would regard arbitrators' potential modifications of the entitlement as part of the entitlement's definition.⁴⁸² But a sizeable majority of the Court has ringingly reaffirmed the Constitution's independent voice on the procedures attached to entitlements, and could not employ the same device.⁴⁸³ Thus, I would not at this time count as a "cost" of "some evidence" review its interference with arbitral compromise.

The "some evidence" issue illustrates the need for circumspection before hastily assimilating involuntary arbitration of property entitlements to the increasingly favored process of voluntary arbitration.

479. ACUS, Recommendation 86-3, ¶ 4(e), 1 C.F.R. § 305.86-3, *reprinted in* SOURCEBOOK, *supra* note 455, at 113, 114.

480. *Id.* at ¶ 4(d).

481. Compare the similar discussion in part IV, *supra* notes 376-77 and accompanying text.

482. See *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559 (1985) (Rehnquist, J., dissenting).

483. *Cleveland Bd. of Educ.*, 470 U.S. 532.

If Congress wishes to employ some form of arbitration as the mandatory means for resolving certain entitlement disputes, then due process requires greater safeguards of the integrity of the arbitral process. While Congress might attempt to preclude due process challenges to arbitration, there is no evidence that it has consciously done so. The Court wisely preserved in *Thomas* the opportunity of specifying the level of review that due process requires for mandatory arbitration, and there are strong arguments for continuing to apply the broad due process requirement of "some evidence" review.

VI. CONCLUSION

Although the Supreme Court has not consistently articulated a theory to justify the "some evidence" requirement, the Court's instincts have driven it to apply and extend the requirement again and again in the face of palpably unfair administrative and judicial proceedings. From the perspective of a dignitary approach to due process, the history of "some evidence" review demonstrates its pedigree as a guarantee of the integrity of adjudicative hearings.

Even from a cost-benefit perspective, "some evidence" review tends to earn its keep as a check against inexcusable and highly demoralizing departures from bedrock procedural requirements. Of course, where the incremental costs of judicial review exceed the expected value of remedying such departures, a cost-benefit analyst would recommend withholding review.

I hope that my inquiry into the function and content of the "some evidence" requirement will lessen the present uncertainty over the requirement's rightful field of application. Properly understood, the requirement does not represent sporadic judicial overreaching, but rather an essential part of the judicial task in enforcing constitutional limits on governmental deprivations of liberty and property.

APPENDIX

A. A Scorecard — “Some Evidence” Distinguished from Related Standards

1. Sufficiency of the Evidence as an Issue of Law

In jury trials,⁴⁸⁴ courts have long patrolled the boundaries of the province of the jury by denying its authority to reach a verdict on insufficient evidence.⁴⁸⁵ The directed verdict and the judgment notwithstanding the verdict are familiar devices that serve this function.⁴⁸⁶ A bare minimum of evidence, even a “mere scintilla,” was once said to be sufficient to get an issue to the jury;⁴⁸⁷ in this century the required quantum of evidence has been described as “substantial” evidence,⁴⁸⁸ or more fully, as evidence sufficient to enable a reasonable factfinder applying the appropriate burden of persuasion in light of the applicable substantive law to make a finding in favor of the party resisting the motion.⁴⁸⁹

Under the influence of traditional formulations of the appropriate roles of judges and juries, courts have justified these jury control devices by stating that the sufficiency of evidence is an “issue of law,” not an “issue of fact.” Scholars have criticized this characterization, insisting that it reverses the true explanation: courts limit the factfinding discretion of juries for reasons of institutional policy, and the sufficiency of the evidence in a given case is an issue of law only in the sense that it is an issue that the judges will decide.⁴⁹⁰ Although well taken, these criticisms have had little or no effect on the judicial vocabulary.⁴⁹¹

Nor have these criticisms prevented similar terms and practices from playing a central role in modern administrative law. Use of the

484. In civil trials, the court may direct a verdict for either plaintiff or defendant on any issue in an appropriate case. *See, e.g.*, 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2535 (1971). In criminal trials, the court may direct a verdict in the defendant's favor, but it has long been said that a court is not permitted to direct a verdict in favor of the prosecution, *see* 2 C. WRIGHT & A. MILLER, § 461, or perhaps more accurately, that the court cannot direct a verdict in the prosecution's favor on the ultimate issue of conviction, *see* *Sparf v. United States*, 156 U.S. 51 (1895); *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967) (refusal to instruct a jury on a defense because of defendant's failure to meet burden of production tantamount to a directed verdict on that issue).

485. *See, e.g.*, Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950).

486. *See, e.g.*, 9 C. WRIGHT & A. MILLER, *supra* note 484, § 2524.

487. *See, e.g.*, Blume, *supra* note 485, at 570, 573.

488. *See, e.g.*, 9 C. WRIGHT & A. MILLER, *supra* note 484, § 2524.

489. *See, e.g., id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

490. *See, e.g.*, J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 202-07, 234-35 (1898); *see* 4 K. DAVIS, *supra* note 82, § 30.02.

491. *See, e.g.*, 4 K. DAVIS, *supra* note 82, §§ 30.02-03.

common law writ of certiorari to review the decisions of inferior tribunals for errors of law appearing "on the face of the record" has a long history in England.⁴⁹² Where the evidence before the tribunal was set out as part of the "record," lack of evidentiary support for a necessary finding constituted such an error of law.⁴⁹³ The English courts narrowed the reach of common law certiorari in the mid-nineteenth century,⁴⁹⁴ but the broader scope of review survived in the United States.⁴⁹⁵ Some of the early cases equated the applicable standard to that employed in jury trials, which they regarded as satisfied unless there was "no" evidence.⁴⁹⁶

The modern version of this standard is the familiar "substantial evidence" test of federal administrative law. The federal courts do not rely on common law certiorari.⁴⁹⁷ But by the 1930s the Supreme Court was reviewing factual findings of federal agencies under a test of evidentiary sufficiency modeled on the directed verdict standard of civil jury trials (in its modern, "reasonable factfinder" form).⁴⁹⁸ The Court has continued to justify this review on the theory that the adequacy of evidentiary support is an issue of law, and hence an appropriate subject for judicial inquiry.⁴⁹⁹ Moreover, as Chief Justice Hughes trenchantly observed, if the judiciary were bound by administrative findings of fact regardless of the absence of evidentiary support, the agencies could circumvent the courts' authority to declare the law by making fictional findings.⁵⁰⁰ This substantial evidence test continues to play a dominant role in administrative law today,⁵⁰¹ af-

492. See E. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 143-59 (1963).

493. See, e.g., H. WADE, ADMINISTRATIVE LAW 275-77 (4th ed. 1977).

494. *Id.* at 259-62. Since World War II, the doctrine of error of law on the face of the record has enjoyed quite a renaissance in England. *Id.* at 262-64.

495. See, e.g., *People ex rel. Hart v. Board of Fire Comm'rs*, 82 N.Y. 358 (1880); *People ex rel. Cook v. Board of Police*, 39 N.Y. 506 (1868); *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444 (1872); L. JAFFE, *supra* note 50, at 107.

496. See *People ex rel. Cook*, 39 N.Y. at 518; *Rex v. Davis*, 6 T.R. 177 (1795).

497. See, e.g., L. JAFFE, *supra* note 50, at 166-67.

498. See, e.g., *Consolidated Edison Corp. v. NLRB*, 305 U.S. 197, 229 (1938); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 252, 300 (1939).

499. See, e.g., *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 208-09 (1940).

500. See J. LANDIS, *supra* note 307, at 135-136 (quoting Chief Justice Hughes' address to the Federal Bar Ass'n as reported in the N.Y. Times, Feb. 13, 1931, p. 18); cf. W. NELSON, THE AMERICANIZATION OF THE COMMON LAW 169-70 (1975) (increased use of power to set aside jury verdicts part of shift of lawmaking power from juries to judges).

501. The APA makes the substantial evidence test presumptively applicable to "on the record" adjudicative proceedings. 5 U.S.C. § 706(2)(E). Other standards of review of agency action also exist, e.g., the arbitrary and capricious test for informal agency adjudication, 5 U.S.C. § 706(2)(A); de novo factfinding in unusual cases, see, e.g., 5 U.S.C. §

ter a slight increase in its stringency in response to the legislative history of the Taft-Hartley and Administrative Procedure Acts.⁵⁰²

The same considerations were also used earlier in this century to justify the Supreme Court's inquiry into the sufficiency of the evidence to support factual findings essential to the disposition of a federal claim by a state court whose judgment was being reviewed on a writ of error.⁵⁰³ The view that the writ of error limited the Court to deciding issues of federal *law* made such a justification necessary.⁵⁰⁴ Since the substitution of certiorari and appeal for the writ of error, the Court has felt empowered to develop a broader scope of review.⁵⁰⁵

These modern tests of the legal sufficiency of evidence treat evidence as insufficient if no reasonable factfinder could reach a result favorable to the opposing party on the basis of the available evidence. In contrast, the Supreme Court has repeatedly asserted that the "some evidence" test is *not* a test of the sufficiency of evidence; and the Court has applied this requirement even in cases from state courts or agencies where decisions cannot be reversed by the federal courts for mere "errors of law."

2. *Sufficiency of the Evidence in Criminal Cases as a Due Process Issue*

Almost ten years ago, the Supreme Court held for the first time that the Constitution forbids a criminal conviction if the record would not permit a rational factfinder to find the defendant guilty beyond a reasonable doubt. In 1970, the Court had held that due process requires that the reasonable doubt standard be employed in state criminal cases.⁵⁰⁶ The Court reinforced this standard in *Jackson v. Virginia*⁵⁰⁷ by rejecting the view that merely giving a jury instruction on reasonable doubt satisfied this requirement. Rather, federal courts sitting in habeas corpus must examine the trial record to make sure that the evidence at trial was sufficient to permit a rational finding of guilt beyond a reasonable doubt.⁵⁰⁸

706(2)(F); and *Ng Fung Ho v. White*, 259 U.S. 276 (1922); the "basis in fact" test applied to selective service determinations, *see supra* notes 85-120 and accompanying text, and the "unsupported by the weight of the evidence" test applied to decisions of the Commodities Future Trading Commission, *see supra* note 84 and accompanying text.

502. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

503. *See, e.g., Northern Pac. Ry. Co. v. North Dakota*, 236 U.S. 585, 593 (1915); *Creswell v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246, 261 (1912).

504. *See Hill, The Inadequate State Ground*, 65 COLUM. L. REV. 943, 946 n.18 (1965).

505. *Id.*; *see infra* text accompanying notes 519-23.

506. *In re Winship*, 397 U.S. 358 (1970) (juvenile).

507. 443 U.S. 307 (1979).

508. The court seemed to equate this standard to the standard already used for appellate review of the sufficiency of the evidence in federal criminal trials, thus sug-

Like the "some evidence" requirement, this standard of review permits federal courts to find constitutional error in convictions in state court for crimes defined under state law. Unlike it, however, the *Jackson v. Virginia* holding is expressly characterized as addressing the *sufficiency* of evidence,⁵⁰⁹ in the limited context of vindicating a constitutionally mandated burden of proof beyond a reasonable doubt.

3. *The Doctrine of Jurisdictional Fact*

Another ancient device for limiting the damage done by inferior administrative tribunals is the much-criticized doctrine of jurisdictional fact. When a tribunal had been given jurisdiction to deal with only certain classes of cases (for example, to assess an excise tax on strong wines), and a private party claimed that the tribunal had presumed to act in a case outside that jurisdiction (for example, by imposing an assessment on a seller of rosewater), the common law courts asserted the power to redetermine the facts on which the jurisdictional issue turned.⁵¹⁰ This approach differs from the preceding tests of evidentiary sufficiency in two ways: first, the court's review is more intensive, including in some historical periods trial de novo on the factual issue,⁵¹¹ and second, only a limited set of factual issues are subjected to this more intensive review. Jurisdictional fact review has been justified as a necessary antidote to the natural tendency of all tribunals to expand their jurisdiction,⁵¹² a phenomenon to which the common law courts were no strangers.⁵¹³

While the jurisdictional fact approach has a long history, the case most familiar to American lawyers today is no doubt *Crowell v. Benson*,⁵¹⁴ where the Supreme Court held that a federal district court

gesting that nothing turns on the substitution of "rational" for "reasonable," *see id.* at 317-19, and that the court must view the evidence favoring the prosecution in the light of the record as a whole, *see id.* at 334 (Stevens, J., concurring).

509. *Id.* at 322.

510. *See* L. JAFFE, *supra* note 50, at 626-29.

511. *See, id.* at 628-29; DESMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 140-41 (4th ed. 1980) [hereinafter DESMITH]; E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 291-93 (1928).

512. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk*, 98 U. PA. L. REV. 163, 165 (1949); DESMITH, *supra* note 511, at 112; *see* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 111 (1971); Winter, *The Quiche Brief*, 10 REG. 31 (Sept./Oct. 1986).

513. *See, e.g.*, S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 61-65 (2d ed. 1981).

514. 285 U.S. 22 (1932).

entertaining a challenge to a workers' compensation claim should try de novo the "jurisdictional" issues of the employer's involvement in interstate commerce and the existence of an employer/employee relation.⁵¹⁵ The vehement dissent of Justice Brandeis questioned the logic of the distinction between jurisdictional and non-jurisdictional facts,⁵¹⁶ and insisted that de novo review would destroy the usefulness of administrative tribunals.⁵¹⁷ These criticisms, resoundingly echoed by academics, led to the virtual extinction of the jurisdictional fact doctrine in federal administrative law.⁵¹⁸

The jurisdictional fact doctrine has narrower applicability than the "some evidence" requirement, since it only empowers courts to keep inferior tribunals of the same legal system within their limited jurisdiction, and attempts to single out a privileged category of factual issues for jurisdictional fact review. Furthermore, many formulations of the jurisdictional fact doctrine require a much greater evidentiary basis for the inferior tribunal's factfinding than the "some evidence" standard, or even permit the parties to submit new evidence to the court concerning the truth of the jurisdictional "fact."

4. *The Doctrine of Constitutional Fact*

The majority opinion in *Crowell v. Benson* relied not only on a jurisdictional fact approach derived from English administrative law, but also on a newly-developed American practice regarding factfinding in constitutional litigation: "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."⁵¹⁹ This "constitutional fact" doctrine⁵²⁰ permits an appellate tribunal to resolve factual issues without being bound by the prior factfinding of lower tribunals, whether courts of agencies.⁵²¹ The rationale for

515. *Id.* at 62-65.

516. 285 U.S. at 73-74 (Brandeis, J., dissenting).

517. *Id.* at 93-94.

518. See, e.g., Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055 (1932); Jaffe, *The Contributions of Mr. Justice Brandeis to Administrative Law*, 18 IOWA L. REV. 213, 224-26 (1932); Schwartz, *supra* note 512, at 180-82.

519. 285 U.S. at 60 (citing *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) and *Ng Fung Ho v. White*, 259 U.S. 276 (1922)).

520. It is said that the phrase "constitutional fact" was coined in Dickinson, *supra* note 518. See Monaghan, *supra* note 314, 231 n.17; Larson, *The Doctrine of "Constitutional Fact"*, 15 TEMP. U. L.Q. 185, 186 n.4 (1941).

521. See generally Monaghan, *supra* note 314; Strong, *The Persistent Doctrine of "Constitutional Fact"*, 46 N.C. L. REV. 223 (1968). As articulated in *Crowell*, 285 U.S. 22, the doctrine gave the parties a right to present new evidence to the Article III court for trial de novo on the constitutional "fact"; the Court retreated from this in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) (court should ordinarily proceed on administrative record).

the doctrine is that the responsibility of Article III courts to safeguard constitutional rights cannot be adequately exercised if administrative bodies and state courts are free to specify the factual context in which the constitutional issue must be judged.⁵²² The constitutional fact approach has been, to say the least, unevenly applied.⁵²³ Henry Monaghan has convincingly argued that the doctrine can only be understood as an assertion of a judicial *power*, to be exercised in accordance with a discretion whose underlying principles the Court has not adequately articulated.⁵²⁴

Like the jurisdictional fact doctrine, constitutional fact review permits a more independent scrutiny of the evidence in a narrow class of cases than the "some evidence" requirement. Both the constitutional fact doctrine and the "some evidence" requirement are potentially applicable to any tribunal, state or federal, judicial or administrative, but constitutional fact review appears to be discretionary in a way that "some evidence" review is not.

5. *Habeas Corpus Review of Pretrial Commitment*

Historically, one important function of the writ of habeas corpus was to secure the release on bail of defendants being held for trial.⁵²⁵ The courts later generalized this use of the writ into a review of probable cause for pretrial commitment, discharging the prisoner altogether if she was held on an insufficient legal or evidentiary basis.⁵²⁶ Chief Justice Marshall employed this doctrine in *Ex parte Bollman*,⁵²⁷ discharging Aaron Burr's co-conspirators for lack of evi-

522. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16, 922-24, 929-32 (1982); *Cox v. Louisiana*, 379 U.S. 536, 545, & n.8 (1965); *Stein v. New York*, 346 U.S. 156, 181 (1953) ("else federal law could be frustrated by distorted fact finding").

523. For example, the Supreme Court did not even allude to the tradition of constitutional fact review in its recent opinion creating a federal common law rule giving decisions of state administrative bodies issue preclusive effect in section 1983 actions. See *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

524. Monaghan, *supra* note 314, at 263-67. See also Larson, *supra* note 520, at 208-09. Monaghan identifies the factors that he believes should inform this discretion. Monaghan, *supra* note 314, 271-76.

525. See, e.g., R. SHARPE, *THE LAW OF HABEAS CORPUS* 125-27 (1976). Section 33 of the Judiciary Act of 1789 granted the Supreme Court authority to admit prisoners to bail, 1 Stat. 91; Chief Justice Marshall explained that this grant was to be exercised through the habeas power conferred by Section 14 of the Act. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99-100 (1807).

526. See, e.g., R. SHARPE, *supra* note 525, at 125-29; Oaks, *Habeas Corpus in the States — 1776-1865*, 32 U. CHI. L. REV. 243, 258-61 (1965).

527. 8 U.S. (4 Cranch) 75.

dence of a treasonable design. Although this mechanism for interlocutory supervision in criminal cases flourished in nineteenth century America, there was no consensus on the relevant standard of review. Marshall had engaged in an independent determination of probable cause,⁵²⁸ as did the courts of some states.⁵²⁹ Other state and federal courts limited their inquiry to whether the record contained any competent evidence of guilt.⁵³⁰ This more deferential standard became the rule in the federal courts, where it was prominently employed in cases of "removal" (transfer of an accused from the district where he had been arrested to the district where the trial would be held)⁵³¹ and international extradition.⁵³² Most of these uses of federal habeas corpus have since been superseded by other procedures,⁵³³ but habeas review of international extradition decisions under the any-competent-evidence test remains the law today.⁵³⁴

The courts never settled on a definitive rationale for this limited review of probable cause determinations. Some judges regarded the absence of competent evidence to support the charge as a "jurisdictional" defect, and therefore as one cognizable on habeas.⁵³⁵ Justice Holmes characterized the rule as "a somewhat liberal extension" of the court's responsibility to determine whether the magistrate had jurisdiction and whether the offense charged was subject to extradition under the relevant treaty.⁵³⁶ As he pointed out, a mere probable cause determination that anticipates an imminent judicial trial should require less evidentiary support than an actual finding of fact.⁵³⁷ Nevertheless, there is arguably a need for *some* review of a nominally interlocutory extradition decision before the prisoner is removed from the court's jurisdiction and delivered to a foreign power.⁵³⁸ On the other hand, there is reason to suspect that an "any

528. *Id.* at 114, 135-36.

529. *See, e.g.*, CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS §§ 179, 181 (2d ed. 1893).

530. *Id.* §§ 180, 230-31.

531. *See, e.g.*, *Price v. Henkel*, 216 U.S. 488 (1910).

532. *See, e.g.*, *In re Oteiza y Cortes*, 136 U.S. 330 (1890); *In re Stupp*, 23 F. Cas. 296 (C.C.S.D.N.Y. 1875) (No. 13,563) (Blatchford, J.).

533. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1 (1951) (motion for reduction of bail); *DiCesare v. Chernenko*, 303 F.2d 423 (4th Cir. 1962) (motion to dismiss commitment); *but see Roba v. United States*, 604 F.2d 215 (2d Cir. 1979) (habeas used to test conditions of custody on removal).

534. *See, e.g.*, *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980).

535. *See Ornelas v. Ruiz*, 161 U.S. 502, 512 (1896); *In re Stupp*, 23 F. Cas. 296, 300 (C.C.S.D.N.Y. 1875) (No. 13,563) (Blatchford, J.); *cf. R. SHARPE, supra* note 525, at 78 (similar argument made in English law).

536. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *cf. Armah v. Government of Ghana*, [1968] A.C. 192, 234-35 (judgment of Lord Reid) ("In my view jurisdiction has nothing to do with this matter.").

537. *Id.*; *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911).

538. This need not, however, explain the use of habeas to review preliminary stages of a criminal case that would otherwise proceed through the same court system.

evidence" test was unthinkingly imported from the procedure on common law certiorari,⁵³⁹ given the use of "certiorari-in-aid" in conjunction with habeas to bring the record of the proceedings before the habeas court.⁵⁴⁰

Whatever the rationale, this traditional habeas test serves a different function from that served by the constitutional "some evidence" test. The former permitted a supervisory court to abort ongoing criminal proceedings because of lack of probable cause; aside from the extradition procedure, it applied to criminal proceedings within the same judicial system. The "some evidence" doctrine requires a court to overturn a completed adjudication by another tribunal, whether administrative or judicial, state or federal.

Modern notions of exhaustion of remedies have played a role in the curtailment of such review. *See, e.g., Stack*, 342 U.S. at 7; *Riggins v. United States*, 199 U.S. 547 (1905). *Cf. R. SHARPE*, *supra* note 525, at 128-29 (habeas review of evidentiary basis for committal has survived in Canada, despite its extinction in England).

539. *See supra* text accompanying notes 492-96.

540. *See Oaks*, *supra* note 526, at 259; *CHURCH*, *supra* note 529, § 264; *Armah*, [1968] App. Cas. at 234-35 (judgment of Lord Reid).

